

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WILLIAM HANLEY

APPELLANT

VS.

THE PACIFIC LIVE STOCK COMPANY
a Corporation

APPELLEE

Brief on Behalf of Appellant

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON
FROM THE DECREE ENTERED AUGUST 3, 1915

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States for the District of Oregon, from
the Decree Entered August 3, 1915.*

STATEMENT OF THE CASE

This is an appeal from a decree adjudging the appellant William Hanley guilty of contempt in violating a prior decree of the United States District Court of Oregon adjudicating certain water rights. A somewhat detailed statement of the case will aid in understanding the contentions made on this appeal.

The Harney Valley is a great flat basin lying in Eastern Oregon, devoted largely to cattle raising and the growing of wild hay. The Silvies River comes out of the Blue Mountains to the north and enters the Harney Valley on the northwest side of it and flows in a general southeasterly course to Malheur Lake in the southerly end of the valley. A few miles south of the point where the river enters the valley it divides into the east and west forks, and those forks continue to flow in a general southeasterly direction toward Malheur Lake, and the country in between them is called "the Island." The main ranch of the appellee, the "Island Ranch," being situated on this island at the lower end, takes its name from that fact. The slope of the valley from the north toward the Malheur Lake is very little and practically imperceptible to the eye, and the Silvies River is a sluggish stream. In the Spring the melting snows in the mountains cause the river to flood over its banks and inundate a good deal of the surrounding country, and give it natural irrigation, from which the wild grasses grow. The silt carried down in the river every year in its annual freshet and deposited along the banks of the river as it overflows, has raised the banks of the river, in the upper part of the valley, above the level of the surrounding country, the rise in the banks being often as much as two feet. But as the river continues southeasterly and gets further away from the mountains from which the silt has come, this elevation of the banks ceases,

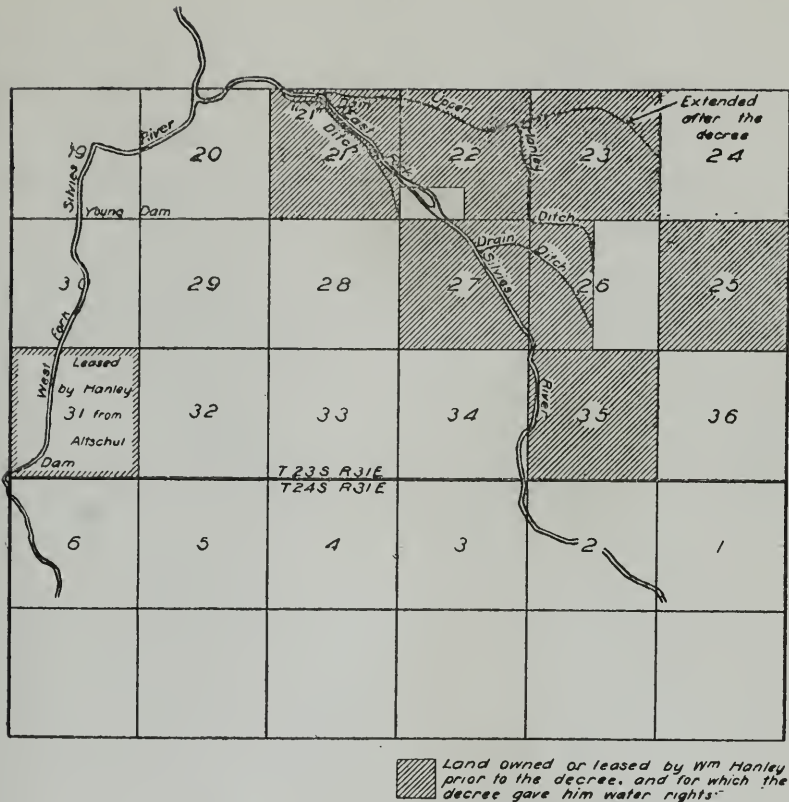
the silt having, as one would naturally expect, been deposited along the upper reaches of the river.

Another peculiarity of the river is that the east fork (we do not know whether the same thing happens on the west fork) gets smaller and narrower and more confined as it flows southeasterly, so that in section 27, township 23 south of range 31 west, belonging to the appellant Hanley, the channel is much more confined than it is a mile or so further up the river, and as the river continues to flow south from Section 27, through Sections 34 and 35, immediately south of Section 27, it practically ceases to be a channel at all and is so little and narrow and crooked and choked up that it does not carry the water that comes down; and in the days before anything was done to relieve this condition, the water spread over Sections 27, 34 and 35 and made them tule and marsh land. Some distance further southeast from these Sections 34 and 35 the channel of the river re-forms again and continues on to the Malheur Lake.

Speaking generally, the main body of the appellant Hanley's land (now the property of the William Hanley Company) lies on the east fork of the river a little below where the river divides into the east and west forks, and above the main body of land of the Pacific Live Stock Company, the appellee, which is further down the river.

October 3rd, 1899, the Pacific Live Stock Company filed in the United States District Court for the District of Oregon, its bill of complaint against

Hanley and a large number of other defendants who were diverting the waters of the river above the Pacific Live Stock Company's lands, the general purpose of the bill being to determine the water rights of the parties to the waters of the Silvies River. The following sketch indicates the lands owned or leased by Mr. Hanley at the time the suit was started, and also shows his dam and ditch system on the east fork of the river as it then existed and the 31 dam on the west fork of the river which he had under lease at the time the suit was started, and also shows the Young dam,—all of which are involved in this contempt proceeding. The Hanley Upper Ditch shown on the sketch is sometimes referred to in the testimony as the "21 ditch," because it is the main ditch leading from the 21 dam. This is a careless use of names. The true 21 ditch is the smaller ditch which the sketch shows on the *west* side of the east fork, paralleling the river bank.



Your Honors will notice that at the time the suit was brought all of the land that Hanley owned was comprised in what is known as the Bell-A ranch on the east fork of the river. This was quite an extensive property and all of Hanley's interests were centered there. He did, however, have Section 31 on the west fork of the river under lease from Charles Altschul. This was the only section he had on the west fork of the river, and we repeat it was only under a lease. This Section 31 was riparian to the river and was watered by the 31 dam, or as it has sometimes been called in this contempt proceeding, the Luig Dam. This 31 dam was

put in the river by Pete Stenger sometime in the eighties. Pete Stenger was the original lessee of this section from Charles Altschul and Hanley succeeded Stenger as lessee and succeeded to his rights in the dam.

The bill of complaint, as far as Hanley was concerned, attacked only his dam and ditch system on the east fork of the river. He was not in any way charged with the use of the 31 dam on the west fork. The bill alleged that Caspar Luig was using a dam there but was silent as to Hanley, and no charge whatever was made against him in the bill on account of his use of the dam which he was using under his leasehold of Section 31. The bill did, however, call upon him to make a full disclosure in regard to his claims as set forth in the bill, and also prayed for an injunction restraining him and the other defendants from diverting any of the water of the river or the east or west fork thereof. Hanley filed an answer in which he set up fully the rights that he claimed under the dam and ditches mentioned in the bill,—that is, his dam and ditches on the east fork of the river, which were all the lands that he owned. He did not set up any right to the 31 dam which he was using as the lessee of Section 31, and which the bill made no mention of. A good deal of testimony was taken on behalf of the complainant and finally various stipulations were entered into between the complainant, Hanley and the other numerous defendants, in accordance with which stipulations a decree was entered. This

decree, in so far as it affected Hanley, followed closely the stipulation between him and the complainant and was as follows:

“That the defendant W. D. Hanley may maintain his dam in the east fork of Silvies River where the same is now constructed and built on and across said river in section 21, township 23 south, range 31 east, Willamette Meridian, and maintain his ditches leading from said dam as the same are now constructed and built from the 5th day of May each year, until the 1st day of July each year, and by means of his said dam and ditches may retain the waters of said Silvies River during said time and divert and use so much thereof as shall be necessary to irrigate Sections 27, 35, 21, 23 and 25, the north half of Section 22, the north half of the south half of Section 22, and the south half of the southeast quarter of Section 22, and the west half of Section 26, all in township 23 south, range 31 east, Willamette Meridian; that the said W. D. Hanley may maintain his ditch constructed across a portion of the land above described leading out of the east fork of Silvies River on the east side thereof on the south half of Section 27 above described and extending southeasterly until it enters into and upon the land of the complainant on or near the southwest quarter of the southeast quarter of section 26, township 23 south, range 31 east, Willamette Meridian, but

shall maintain said ditch for the purpose of draining water from the surface of the land above described and not for the purpose of irrigation. If at any time and while the dam of the said W. D. Hanley is open so that it does not obstruct the flow of the water in said river and from natural causes the waters of said east fork of Silvies River shall overflow its banks upon the land of the said W. D. Hanley, or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described, said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid, and during such time as the same may run thereon from natural causes and without any obstruction of the channel of said river."

* * * *

"That the defendants W. D. Hanley (and others, naming them), and each and all of them, and the attorneys, agents, servants and employees of them, and the attorneys, agents, servants and employees of each of them, be and they and each of them are perpetually enjoined and restrained and strictly inhibited from diverting any of the water of Silvies River and any of the water from the east fork of Silvies River and any of the water from the west fork of Silvies River from the channels of said rivers

and from the channels of each of said rivers, and that they be and they and each of them are perpetually enjoined and restrained and strictly inhibited from impeding the flow of any of said water to and upon the lands of the complainant hereinbefore described as the said water has heretofore been wont to flow thereon when not interfered with by the said defendants and by the said intervenor, either jointly or severally, and that they be and they are and that each of them be and he is required to remove all and any dams which they or either of them may have, or which any one of them may have, in the channels of Silvies River or in the channels of the east fork of Silvies River or in the channels of the west fork of Silvies River, and that they be and they are and that each of them be and each of them is hereby perpetually enjoined and restrained and strictly inhibited from rebuilding the same, or any thereof; and that they be and they are and that each of them be and each of them hereby is perpetually enjoined and restrained and strictly inhibited from in any manner obstructing the flow of the waters of Silvies River and from in any manner obstructing the flow of the waters of the east fork thereof and from in any manner obstructing the flow of the waters in the west fork thereof, and from obstructing the flow of the waters of said rivers, or any thereof, in all and in each of the channels thereof, save and

except as is in this decree more particularly set forth.

“20. That this decree shall run in favor of the complainant, its successors and assigns, and against the defendants, their heirs, personal representatives, successors and assigns, and against each of the said defendants and the heirs, personal representatives, successors and assigns of each of said defendants; and against the complainant, its successors and assigns and in favor of the said defendants, their heirs, personal representatives, successors and assigns; and that the waters of Silvies River and the waters of the west fork of Silvies River and the waters of the east fork of Silvies River and the waters in any of the channels of said Silvies River and in any of the channels of the east fork thereof and in any of the channels of the west fork thereof may be used and enjoyed by the defendants only as in this decree is particularly set forth, and not otherwise, and only at the times and in the places and for the purposes in this decree set forth, and not otherwise.”

Some time after this decree was made the William Hanley Company was incorporated and purchased from Charles Altschul, through Mr. C. E. S. Wood, the riparian Section 31, which Mr. Hanley had had under lease at the time of the decree, and also Section 29, both in township 23

south, range 31 east, and Section 5, in township 24 south, range 31 east. All of these came from Charles Altschul, who was the owner of these lands when the decree was made and who was not a party to the original suit. Mr. Hanley, and later the William Hanley Company, during all these years continued to water Section 31 from the 31 dam, in the same way as it had been watered before the decree, and regardless of the decree. In order to irrigate Section 29 the William Hanley Company, some years after the decree, joined George Young in the construction of a dam in the southeast quarter of Section 19, just north of the line between it and Section 30. Young was a party to the original suit and was allowed by the decree a dam for the irrigation of his land in Section 30. This old dam washed out and Young, moving up the river about a thousand feet, put a new dam in as a substitute for the old one, and this is the dam on the south line of Section 19 in the construction of which the William Hanley Company joined him. Young was adjudged in contempt by Judge Bean for the use of this dam and thereafter sold out all interest in the dam to the William Hanley Company, which has used the dam for irrigating Section 29, and possibly, though of this the writer is not sure, for the partial irrigation of Section 5.

Since the entrance of the decree a small ditch was built by some settlers from the east fork of the river in the northeast corner of Section 34, 23 south, 21 east, westerly along the north line of that sec-

tion and into Section 33. This was known as the Orphan Ditch. The land which it served was subsequently acquired by the Pacific Live Stock Company and the ditch became the subject of controversy between Mr. Hanley and the Pacific Live Stock Company and was involved in a contempt proceeding before Judge Bellinger. In the fall of 1914 this Orphan Ditch, together with the headgate where it tapped the river, were greatly enlarged by the Pacific Live Stock Company and the left bank of the ditch was converted into a large levee for the purpose of holding back the water that came from Mr. Hanley's Section 27 onto the Pacific Live Stock Company's Section 34. This levee succeeds in holding back the water as intended.

Another change that has taken place since the entry of the original decree is that the William Hanley Company has bought Section 3 and the south half of the northwest quarter of Section 2, in township 24 south, range 31 east. This is known as the Fennimore Place. Section 3 adjoins the Pacific Live Stock Company's Section 34 on the south. The right to water this Section 3 has also been a subject of controversy, the Pacific Live Stock Company charging Mr. Hanley with a violation of the decree for attempting to water this section, but Judge Bellinger decided that there was no violation, since this section was not involved in the original suit and Hanley had acquired it, and the water rights that went with it, subsequent to the decree.

The foregoing is an attempt to state the condi-

tions existing at the time of the decree and the important changes since then.

Numerous contempt proceedings have grown out of the original decree, and this court has once before had some of these matters before it. (200 Fed. 468.)

The present contempt proceeding was commenced by the filing, on April 29, 1915, of an affidavit sworn to on April 26, 1915, by John Gilcrest, superintendent of the Pacific Live Stock Company, in which the defendant William Hanley was charged with violations of the decree, and an order to show cause was issued requiring Mr. Hanley to appear on May 7th and show why he should not be punished for contempt. The affidavit of Mr. Gilcrest, after stating that the Spring of 1915 was a very "short water" year owing to a light snowfall in the mountains the preceding winter, charged Mr. Hanley with the following violations of the decree:

I.

That Henry Luig had closed the Luig dam before the date permitted by the decree and had diverted water from the river, and that "William Hanley encouraged, advised and assisted said Henry Luig in the acts aforesaid and in the contempt and violation of the said decree as aforesaid."

II.

That the defendants Young, Hotchkiss and Thornburg had built a new dam a quarter of a mile up-stream from the dam permitted by the decree,

with a permanent board across the bottom of the dam to obstruct the water, and had, during the month of April, 1915, before the date permitted by the decree, diverted water from the river and taken it to their lands, and that "in all the acts aforesaid the defendants have been acting under the advice and encouragement and with the assistance of the said defendant William Hanley."

III.

That defendants Hull Hotchkiss and Carey Thornburg obstructed the west fork of the river by placing timbers, boards and other material in the old dam known as the Voegtly Dam, and that in so doing were "assisted, advised and encouraged by the said defendant William Hanley, all in willful contempt and violation of the terms of said decree."

IV.

That defendants P. G. Smith and Carey Thornburg, in the Fall of 1914 and the Spring of 1915, built a new dam in the west fork of the river, which dam was not permitted by the decree, and in doing so were "acting with the assistance, advice and encouragement of the said William Hanley and in willful contempt and violation of the terms of the said decree."

V.

That although the defendant Hanley was enjoined by the decree from using his drain ditch ex-

cept for draining water from the surface of his land, he, during the months of March and April, 1915, at a time when it was unnecessary to drain water from his lands, had the head of his drain ditch open and by means thereof diverted from the east fork of Silvies River in excess of thirty second feet of water, which he used for the irrigation of his land.

That although the defendant Hanley was enjoined by the decree from obstructing the waters of the river by the use of his 21 dam before the 5th of May, yet in March and April, 1915, he placed one board part way across the dam and permitted and suffered a large amount of brush and debris to gather above the dam which raised the water of the river at least one foot higher than the floor of the dam, and by means thereof diverted into the Hanley Upper Ditch more than forty second feet of water, all in willful contempt and violation of the decree.

That although the defendant Hanley was enjoined by the decree from obstructing the waters of the river prior to the 5th day of May each year, and was also enjoined from diverting any water from the river except such as would naturally flow through the Upper Hanley Ditch, yet during March and April, 1915, in willful contempt and violation of the decree, he made the following diversions by means of cuts in the banks of the river on his land described in the decree, to wit:

“In the left bank of the east fork of Silvies River about 900 feet below the Hanley drain

ditch, a cut in the bank of said river about 12 feet in width and 3 feet in depth, diverting about 50 sec. ft. of water from said river; a cut in the left bank of said river about 1000 feet above the south line of Sec. 27, Twp. 23 S., range 31 E., diverting about 6 sec. ft. of water of said river; besides the foregoing, the said defendant Hanley diverted a large quantity of water through numerous smaller cuts in said river through said Sec. 27 and aided the diversion of water through the same as well as the cuts aforementioned, in the following manner:”

And then goes on to state substantially as follows:

That the channel of Silvies River through Sections 27 and 35, township 23 south, range 21 east, is small and sluggish and easily obstructed, and the defendant Hanley in willful violation and contempt of the decree during the months of March and April, 1915, further obstructed the river by maintaining therein on Section 27 the timbers of an old bridge which had been destroyed across the river, and which timbers he permitted to fall and lodge in the river, and also by maintaining another bridge over the river, the stringers of which were set into and below the banks of the river so that they obstructed the flow of the water, and he also permitted to accumulate in the channel of the river and to be caught by said bridges and timbers, the carcasses of dead cattle and hogs and also other

material which obstructed the channel of the river and assisted the water to flow over the banks and out of the low places along the banks of the river and through the cuts in the banks, above described; and by these means the defendant Hanley diverted about seventy-five second feet of water from the river in addition to the diversions above mentioned, and that he did all of these in willful violation of the terms of the decree.

VI.

That defendants Hudspeth and Dalton, during April, 1915, diverted water through the People's Ditch in Section 31, township 23 south, range 31 east, before the date permitted by the decree. There was no allegation specifically connecting Hanley with this, as is the case of all of the other paragraphs of the affidavit, but counsel for the Pacific Live Stock Company stated at the trial that they intended the language in the preliminary part of the affidavit (page 17 of the record), wherein it is said that the defendants "conspired together" to take water from the river, to cover this paragraph VI of the affidavit and to mean that Hanley assisted Hudspeth and Dalton in their alleged violation.

The defendant Hanley filed an answering affidavit on May 6, 1915, the substance of which was that he had been advised by his counsel that he had a right to use the 31 Dam and the Young Dam, as these water lands which were not involved in the

original decree; that he had not conspired with or assisted any of the defendants in their alleged violations of the decree. That while he had not in any way assisted Luig or encouraged him in the use of the 31 Dam, he had himself used that dam and claimed the ownership of it and the right to use it, regardless of the decree, for the reason, as above stated, that it was not involved in the original suit, but on the contrary Section 31 was the property of Charles Altschul at that time, who was not made a party to the suit, and the William Hanley Company had succeeded to the Altschul rights by purchase. That in the same way and for the same reasons he frankly claimed the ownership and the right to use the Young Dam, but that he had not used a drop of water from that dam that year (1915). That he had had nothing whatever to do with the old Voegtly Dam mentioned in paragraph III of the complaining affidavit, nor with the new Thornburg Dam mentioned in paragraph IV of the complaining affidavit. That he had not used the drain ditch at any time when it was unnecessary to use it for drainage purposes and had not used it for irrigation purposes at all, but that when the drain ditch was used by him it was necessary to use it, because the ice had formed solidly in the river channel and formed a dam in it, and as a consequence the water, when Spring came, was blocked by the ice and went out over the land where the William Hanley Company was feeding cattle and had to be drained off by diverting it from the river

channel; and that as soon as this condition ceased he gave orders to close the head of the drain ditch tight in order that the Pacific Live Stock Company might not have any excuse for complaint. That in regard to the one board and the brush in the 21 Dam, he did not place it there or cause it to be placed there. That there may have been one board part way across the dam, but if so it was without his knowledge and could not have had any material effect on the stream. That the dam is as wide as the river and one small board could not have materially affected it. That if there was brush in the dam it was not deliberately gathered and permitted to remain there, but all such incidental obstructions, which are slight and temporary and occur every year, were by his orders removed as promptly as perceived, because he was extremely anxious to avoid any trouble with the Pacific Live Stock Company; and he denies that the board or brush raised the water above the dam or diverted any substantial quantity of water into his ditch. In regard to the charge that he made cuts in the river bank and thereby diverted water, he denies this absolutely, and says that these are natural gaps and depressions in the river bank (the bank being higher than the surrounding country), and that he has caused these natural gaps and depressions to be filled up, and that while he does not know that they have washed out, still they may have done so and the work in filling them may have been mistaken for evidence that he had made cuts in the bank.

That he has not in any way aided or encouraged the other defendants in their alleged violations of the decree, and that he has not obstructed the river with the bridges as charged in the complaining affidavit; that he has built a new bridge as a matter of greater convenience, but neither it nor the old obstructs the flow of the river. That in regard to the carcasses of cattle in the river, he tried to keep all cattle away from the river during the winter time for fear of their breaking through the ice and drowning. That he heard there was one hog in the channel drowned and that was all that ever came to his knowledge, and that he has made special efforts to end this perpetual litigation with the Pacific Live Stock Company and to try to use the water harmoniously, and to that end he has foregone some of his own rights and suffered injustices, but to no avail. That the Pacific Live Stock Company is attempting to monopolize the waters of Silvies River and to terrify all those who oppose it, and is diverting water in the Upper Silvies Valley up in the mountains without any right, and has enlarged the Orphan Headgate and ditch, and by the construction of a large levee along the south bank of the Orphan Ditch has flooded the water back on the William Hanley Company's Section 27 and held the water there to a depth of two or three feet, destroying the hay on two or three hundred acres, and has done this although Judge Bellinger, in a previous contempt proceeding, ordered the Pacific Live Stock Com-

pany to keep the Orphan Headgate in good repair, as it then existed (it at that time being a very small gate).

The case was tried before Judge Wolverton on the 7th of May, occupying perhaps three days in hearing, and subsequently Judge Wolverton rendered an opinion in which he exonerated the defendant Hanley from any of the charges of conspiracy made in the complaining affidavit and found that he had not assisted, encouraged and aided the other defendants in the violations of the decree, as the complaining affidavit charged, but found him guilty of violating the decree in the following particulars: (1) In using the 31 Dam and thereby diverting water from the west fork of the river onto Section 31; (2) in maintaining the Young Dam for the irrigation of Sections 29 and 5; (3) in operating the drain ditch at a time when it was not necessary to drain the surface of his lands; (4) in obstructing the flow of the river through the 21 Dam by permitting one board and some brush to remain in the dam; (5) by failing to repair the breaks in the river bank in Section 27.

The trial judge concluded his opinion by declaring that defendant Hanley's violations of the decree were willful. The decree entered upon this opinion was that Hanley might purge himself of contempt by keeping the 21 Dam open, as required by the original decree, by closing the drain ditch *"so as to prevent the same from diverting water from said river or from being used except to drain surface*

water from the lands described in said decree," and by keeping the breaks in the river bank in repair and by paying six-eighths of the complainant's costs, amounting to \$332.80, and in addition a fine for the benefit of the complainant of \$250.00; and the decree enjoined Hanley from using the Young Dam or the Luig Dam in Section 31, and required him to remove the remains of the old bridge across the east fork of Silvies River.

From this decree defendant Hanley appealed and we prepared a condensed record for the appeal, in accordance with Equity Rule 75, which record the trial judge ordered supplemented by sending the whole of the original record of this case, since its inception in 1899, to the Circuit Court of Appeals for inspection if desired.

SPECIFICATIONS OF ERROR

I.

The court erred in holding that Hanley's use of the 31 or Luig Dam was a violation of the decree, and in restraining him from further use of it, for these reasons, among others:

1. Hanley was not charged in the complaining affidavit with using the dam, but only with encouraging, advising and assisting Henry Luig to use it, and as contempt proceedings are quasi criminal Hanley cannot be found guilty of any contempt which is not specifically charged against him in the complaining affidavit.

2. The 31 Dam and Hanley's rights to it were not involved in the original suit. At that time Section 31 and its water rights were owned by Charles Altschul; Hanley was merely his lessee. Charles Altschul was not a party to the suit and his rights have never been adjudicated. Since the entry of the original decree the William Hanley Company, by purchase from Altschul, has succeeded to his rights.

3. Even if William Hanley as an individual were personally bound as to Section 31, the William Hanley Company, a corporation, in which he is not the only stockholder holding extensive interests, which corporation acquired Section 31 from Altschul without the title passing through Hanley, would not be bound.

4. The court's ruling is an attempt to adjudicate important property rights in a summary contempt proceeding, which is a thing never allowed.

II.

The court erred in enjoining Hanley from using the Young Dam for substantially the same reasons as above stated in regard to the 31 Dam.

III.

The court erred in holding Hanley guilty of a violation of the decree in his use of the drain ditch for the reason that the vidence shows that Hanley used the drain ditch only when it was necessary to do so, as permitted by the decree.

IV.

Even if Hanley be considered to have violated the decree in the use of the drain ditch, the purgation of the contempt required by Judge Wolverton's decree is unwarranted and erroneous, this requirement being that Hanley must keep the drain ditch closed "*so as to prevent the same from diverting water from said river*, or from being used except to drain *surface* water from the lands described in said decree." The words in italics are what we take exception to.

V.

The court erred in holding that Hanley had used his 21 Dam in violation of the decree for the reason that the evidence does not show facts constituting a violation.

VI.

The court erred in holding that Hanley was guilty of a violation of the decree in not keeping the breaks or cuts in the river bank closed, for the reason that the original decree does not require him to do so, and it is in fact at times impossible to do so, and the evidence shows he did his utmost to keep them closed. The requirement that Hanley, to purge himself of contempt, must keep these cuts closed, is unwarranted and erroneous.

VII.

The court erred in holding that Hanley was guilty of any violation of the decree whatever, and particularly in holding that his violation was willful.

ARGUMENT

THE 31 OR LUIG DAM

The complaining affidavit does not charge Hanley with the violation for which the court found him guilty. There was a variance.

The scope of contempt proceedings is limited strictly to the charges made in the complaining affidavit or information. The proceeding is quasi criminal. In this case Hanley, so far as the 31 dam is concerned, was found guilty of a contempt which is not charged against him in the complaining affidavit.

The only charge made against Hanley in the complaining affidavit in regard to this dam is that he assisted Henry Luig to use it in violation of the decree. The language is that Henry Luig diverted water by means of the dam before the date permitted by the decree and that "the said defendant William Hanley encouraged, advised and assisted said Henry Luig in the acts aforesaid and in the contempt and violation of the said decree as aforesaid." (Record, p. 18.) In short, the charge was

one of conspiracy between Hanley and Luig to violate the decree. The proof of this charge failed utterly, but Hanley frankly admitted that he, independently of Luig, had used the 31 Dam for a great many years to irrigate Section 31 and Section 5; that he had used it regardless of the decree and considered it outside of the decree, and that he had used it during the season complained of—1915. For this the trial judge found him guilty of contempt and made an order forever restraining him from using this dam. This was clearly erroneous, as Hanley was held guilty of contempt for an act which was in no way charged against him in the affidavit and which he voluntarily admitted in order to be perfectly frank with the court. It is fundamental that contempt proceedings, being quasi criminal, the complaining affidavit is in the nature of an indictment and the defendant cannot be tried for anything not specifically charged against him.

In re Reese, 107 F. 942, 947-948.

This elementary rule was recognized by all parties at the trial, as is evidenced by the following colloquy which occurred at its close:

“Mr. Wood: I am gonig to urge, irrespective of any testimony the court allowed to come in for illustration, they (the plaintiff) are bound by the allegations of the complaint.

“Mr. Treadwell: We will not dispute that.

“Court: That will not be disputed.”

Yet the court, when it came to writing his opinion and making his decree, ignored the rule thus expressly recognized, and agreed to by all the parties to this case.

**HANLEY'S RIGHTS TO THE 31 DAM
WERE NOT INVOLVED IN THE ORIGINAL DECREE AND HAVE NEVER
BEEN ADJUDICATED.**

At the time of the original suit and decree Charles Altschul was the owner of Section 31. Hanley had the section under lease from Altschul and was irrigating it from the 31 Dam. Altschul was not a party to the suit and his rights were in no way affected by the decree that was entered. Some time after the decree was entered C. E. S. Wood obtained a contract of sale for Section 31 and turned the section in to the William Hanley Company, a corporation which was formed to take over not only the original Hanley lands but several other tracts, which, like this Section 31, never did belong to Hanley. The William Hanley Company therefore succeeded, by purchase, to all the rights of Charles Altschul in Section 31, and since Charles Altschul was not a party to the decree and was in no way bound by it, the William Hanley Company, as his successor, stands in the same position.

Charles Altschul has never had his day in court on the question of these water rights or this 31 Dam. They may be valuable or they may not be, but at any rate he is entitled to have his day in

court to have them determined, and the William Hanley Company, standing in his shoes, is likewise entitled to its day in court on these rights, and cannot be forced to litigate them in a summary contempt proceeding like this.

This proposition that Altschul was not a party and therefore not bound, and that the William Hanley Company has succeeded to his rights, and is therefore not bound, seems too clear to argue. You cannot argue an axiom. When you have stated it you have said all that is necessary. In view of Judge Wolverton's adverse ruling, however, we shall have to make a few suggestions.

In the first place we call attention to Judge Bellinger's opinion in a previous contempt proceeding between these same parties (record, pp. 321 to 330). The facts on which that opinion was based were these: After the entry of the original decree Hanley bought what was known as the Fennimore Place on the east fork of the river, and for the purposes of irrigating it put a new dam in the river a short distance above the old Fennimore Dam, which had decayed. The Pacific Live Stock Company, adopting the same attitude as it has in this present case, contended that, as the decree limited Hanley to the 21 Dam on his Bell-A Ranch and enjoined him from otherwise obstructing the river, his obstruction by means of the new Fennimore Dam which he had built, was a contempt. Judge Bellinger apparently thought this not worth discussion, for he dismissed it with only these words:

“The Fennimore interest was not involved in the suit in which the decree was entered, and the rightfulness of this check-gate was not adjudicated. Hanley’s act, therefore, in putting in this check-gate is not a matter for which he can be required to answer in this proceeding.”

This rule, it seems to us, became the law of the case. Judge Wolverton, however, has disregarded it entirely. His opinion is silent on it. But, if we correctly understood his position at the trial, he would differentiate the Fennimore Dam from the 31 Dam because, as he holds, the 31 Dam was mentioned in the decree and its uses were strictly limited by the decree to Luig’s land. He also apparently makes a distinction because of the fact that Hanley, though leasing Section 31 at the time the original suit was started, did not set up, in his answer, a claim to this dam. Now, first, as to the claim that the decree limits the use of the 31 Dam to Luig. Judge Wolverton, in his opinion, says (record, p. 52) :

“The decree has specifically declared its (the 31 Dam) status and limited its use, and it can be used for no other purpose without a violation of the decree; and this would be so whether the attempted use was by a party to the suit or by a party not related thereto.”

Now the decree does not limit the use of the dam to the extent the court says. The decree only limits *Casper Luig’s* use of the dam and does not purport

to do any more. The bill of complaint says (p. 1114 of record No. 2036) "Casper Luig has one dam" and the decree says (p. 1175 of record No. 2036) "that the defendant Casper Luig may maintain his dam in the west fork of Silvies River, where the same is now constructed in Section 31, township 23 south, range 31 east, Willamette Meridian, from the 15th day of May to the 1st day of July each year, in the manner and form as the same is now maintained, and thereby may obstruct the flow of the water in said west fork of Silvies River during said period, and use the waters of the west fork of Silvies River so obstructed during said period for the purpose of irrigating and in sufficient quantity to irrigate the east half of the southwest quarter and lots 6 and 7 of Section 6, and the southeast quarter of the northwest quarter and lots 3, 4 and 5 of Section 6, all in township 24 south, range 31 east, Willamette Meridian; and may also use and enjoy so much of the waters of said west fork of Silvies River during all other times as may flow upon the said lands or any other thereof in the natural flow of the water of said river, without obstruction to the channel of said river, and the said defendant will not be required to remove the frame or skeleton of his dam at any season, but except during the period aforesaid shall keep said dam open and the channel of said river unobstructed thereby." And later on the decree in a general clause binds the various successors in interest of the parties (p. 1181 of record No. 2036).

It may be seen that the decree doesn't even attempt to limit the use of the 31 Dam as to anyone but Luig and his successors.

There is even a question whether the 31 Dam now attacked is the dam mentioned in the decree at all. There were two dams over on the west fork,—one the true Luig Dam, which watered their land in Section 6, and the other the Pete Stenger or 31 Dam, which Hanley took over from Pete Stenger when he leased Section 31, and which is the true 31 Dam and is the one now under consideration. Hanley operated this dam as lessee before the decree and when he put it in to replace the old Stenger Dam Luig helped in putting it in, and so gained an interest in it. This was about 1898 or 1899, but at any rate, whatever the date was, Luig first gained an interest in the 31 Dam at the time he and Hanley rebuilt it together. (Hanley's testimony, pp. 185-187, 222, 223.) We merely mention these two dams thus in passing to suggest that the 31 Dam now under consideration may have never even been mentioned in the decree, it being possible that when the decree mentions Luig's Dam it means his own separate dam and not the one in which he was interested with Hanley.

The trial court says, in the course of his opinion (record, p. 51) :

"In the light of this testimony it is difficult to believe that Mr. Hanley ever acquired any interest in this dam" (the 31 Dam).

He adds that even if Mr. Hanley did have an interest in it he nevertheless violated the decree in using the dam. His opinion, therefore, that Mr. Hanley never acquired an interest in the dam is perhaps not important, since he does not base his decision on that fact. Nevertheless, we prefer to make a short comment on this finding by the trial court, for it is made against the positive sworn detailed statement of Mr. Hanley (record, pp. 185-187, 222, 223, and Hanley's affidavit, pp. 33-34) and seems to be based largely on the testimony of Henry Luig (record, pp. 309, 313). Since so much importance is given to Luig's testimony that it is allowed to outweigh Mr. Hanley's we have this to say about it: Henry Luig is an ignorant old man, as a reading of his testimony will show, and is a foreigner, not fluent in English, and his testimony consists mostly of answering "Yes" and "No" to very leading questions by counsel for the Pacific Live Stock Company, and Luig himself declares in his testimony again and again that he knows nothing about the dam, that he was away in Washington when his brother and Mr. Hanley built it, and that his brother Casper handled all the business. (This latter fact that Casper Luig and not Henry, the present witness, was the man in control of the Luig affairs, is corroborated by complainant's own bill of complaint which names Casper Luig as a defendant and omits any reference to Henry whatever). Furthermore, Luig admits at the end of his testimony that the old original dam

was put in by Pete Stenger and that Hanley succeeded Pete Stenger in the lease. For the convenience of the court we set out here Luig's testimony and ask whether it should be allowed to outweigh Mr. Hanley's testimony and form the basis for a finding that Hanley never acquired any interest in the 31 Dam at all.

"Mr. Luig, you and your brother Caspar put the first dam in there, did you not, in Section 31?

A. Oh, no. *Sam Voegtly*.

Q. Voegtly owned your place before you got it?

A. Yes, he had a section.

Q. When did Voegtly put it in there?

A. In 1886. *Henry Voegtly* put that dam in in 1886."

(It will be noticed that before he said *Sam Voegtly*.)

"Q. When did you get it—you and your brother?

A. I can't tell you exactly.

Q. About when?

A. He proved up on the land, and then he sold it.

Q. He proved up on the ranch and sold it to you?

A. Yes.

Q. Do you know how long ago?

A. I think it took three years.

Q. Two or three years after 1886?

Mr. Webster: He says it took three years to prove up on it.

Q. You and your brother, until your brother's death, used the dam, did you, until that time?

A. Yes.

Q. Since your brother's death, you have used it every year, have you?

A. Yes. We have put a new dam in.

Q. When did you put the new one in, Mr. Luig?

A. I think in 1905 or 1906—something like that.

Q. When you put in the new dam, did you have any talk with Mr. Hanley at that time?

A. I don't know—I wasn't here—if the other brother put that dam in. I went to Washington. After I came back, the dam was there.

Q. Didn't you give any interest in it when you put in the new one, to Mr. Hanley?

A. I don't know.

Q. You don't know?

A. No.

Q. Well, when you built the first one, you didn't ask Mr. Hanley anything about it, did you?

A. No.

Q. You just went there and built it?

A. Yes.

Q. You didn't ask the Road Company anything about it, did you?

A. That is what the other brothers say. I don't know nothing about it.

Q. So far as you are concerned, you and your brother simply went there and built that dam, and didn't ask the Road Company anything about it, did you?

A. I believe somebody what owned it went at that time. I don't think they can leave it out. I was not here.

Q. Mr. Luig, you testified just the other day over in the proceeding before Mr. Corcoran, didn't you?

A. Yes.

Q. Didn't you testify then that Mr. Hanley never had anything to do with that dam until you put the new one in, in '4, '5 or '6?

A. Yes.

Q. That is right, isn't it?

A. Yes."

(This isn't even testimony, it is only impeachment. State v. Yee Gueng, 57 Ore. 509, 512-517.)

"Q. He never had anything to do with it before that time, is that right?

A. So then after other brother was living, he attended to the business. I don't attend to it.

Q. When you built that new dam, did you take Mr. Hanley in with you and have him help you build it?

A. I don't know. The other brother built it.

Q. Didn't you testify over before Mr. Corcoran, that when you built the new dam you allowed Hanley to help you build it, and gave him an interest in it? Didn't you so testify?

A. Hanley helped our—

Q. Hanley helped you rebuild it?

A. The other brother said he did.

Q. Weren't you right there when the dam was rebuilt?

A. No, I was in Washington.

Q. How long did you stay in Washington?

A. Oh, when I come back the dam was built.

Q. When did you first learn that Mr. Hanley had got an interest in it?

A. That is what the other brother said.

Q. Your brother told you when you came back that he had given Mr. Hanley an interest in it?

A. Yes, that he paid half of the expense. If he done it, I don't know. I got nothing to show."

REDIRECT EXAMINATION.

"Q. That dam was first built by Peter Stenger, wasn't it?

A. It looked like it was there, before Sam Voegtly.

Q. Peter Stenger took a lease of Section 31 from the Road Company, didn't he?

A. Oh, yes, that is what they say.

Q. That is what you understood?

A. Yes.

Q. Hanley succeeded Peter Stenger in that lease, didn't he?

A. I believe he did.

Q. And Hanley has used that dam right along, hasn't he?

A. Most of the time, yes."

This is the testimony which is allowed to outweigh Mr. Hanley's testimony and to lead the court to say that "in the light of this testimony it is difficult to believe that Mr. Hanley ever acquired any interest in this dam." Just consider that a moment. The man who built the dam, whose right to it was far older and better than Luig's, the man who simply let Luig in on it from a feeling of neighborly friendliness, is now declared never to have acquired any interest in it at all.

But as we view it, these things are relatively unimportant. Whether the 31 Dam is the one mentioned in the decree or not and whenever Mr. Hanley got his interest in it, the fact remains that the dam waters the Altschul land and uses the Altschul water rights, which were never involved in the decree, and Hanley, as the successor of Altschul, has a right to those water rights, and to make use of the 31 Dam to avail himself of those rights. The only possible theory on which he could be forbidden to use the 31 Dam would be the theory that the decree limited the use of the dam to Caspar Luig and his successors alone, and barred all the rest of the world, and this, as we have seen, the decree does

not do. If that view be taken of it—that Hanley has the 31 water rights but cannot use them by means of the 31 Dam, because that, as a specific structure, is decreed against and limited to Caspar Luig and his successors alone—then all that Mr. Hanley has to do is to go and build a new dam in the river just above it, which would be a futile and vain thing for the law to require him to do.

In making this part of the argument we do not wish for a moment to be understood as even hinting that Mr. Hanley's interest in that dam is in any way doubtful. As a matter of fact this dam was put in the river in the eighties by Pete Stenger, who had Section 31 under lease and Mr. Hanley immediately succeeded Pete Stenger in his lease, including the dam, about 1898 and continued so until the property was purchased by the William Hanley Company.

Now as to the contention that Mr. Hanley, if he was leasing this dam in 1898 as he says, should have set up his claim to it in his answer to the bill of complaint. His failure to do so seems to have been seized upon by the trial court as one reason for believing that he had no interest in it.

It must be remembered that all of Hanley's main interests were over on the east fork of the river. His Bell-A Ranch, his home and all the lands he owned were over there. He had no interests at that time on the west fork of the river, except his lease of Section 31 from Charles Altschul, which was, compared to his other holdings, a mere incident and

unimportant. All of these leases made by Charles Altschul of the Road Company lands were short term leases, and it is probable that Hanley's lease of 31 was of this character.

The bill of complaint did not charge Hanley with any use of this 31 Dam at all. Mr. Hanley says, in his affidavit (record, p. 44), that Section 31 was deliberately omitted from the complaint by the P. L. S. Company because it was not the complainant's policy to get into any quarrel with the Road Land people or Mr. Altschul. Whatever be the cause, the bill did omit any mention of Section 31 or of Hanley's use of the 31 Dam, and centered its attack on Mr. Hanley's rights and directed his attention solely to his rights on the east fork of the river, which were, both in the complainant's mind and Mr. Hanley's, the important thing between them.

The language of the bill is as follows. After setting up the complainant's alleged right, it says (p. 1113 of record No. 2036) :

"But notwithstanding your orator's said rights, the defendants have wrongfully entered upon the channels of said river and the channels of its said forks above said lands of your orator, or some of them, and have wrongfully constructed and are now wrongfully maintaining divers dams in said channels and ditches leading therefrom; that is to say," (here the bill sets out the dams owned by other defend-

ants) "William D. Hanley has one dam and three ditches leading therefrom."

This clearly indicated Mr. Hanley's dam in Section 21, on the east fork of the river, with its ditches. That is what it was intended by the complainant to indicate, that is what Hanley conceived it to indicate, and it is what it did indicate.

But now, say counsel for the P. L. S. Company, although the bill did not charge Hanley with the 31 Dam, it did call on him to make a full disclosure of all his rights on the river, and having failed in his answer to disclose his claim to the 31 Dam, he is forever barred. Let us examine this contention. Leaving out of consideration now for the moment the fact that the William Hanley Company has acquired the new and independent Altschul rights, which Hanley didn't have at the time of the original suit, and therefore couldn't set up, let us look at the case as if William Hanley, an individual, still held Section 31 under lease, just as he did at the time of the original bill. Counsel say he was called on to make a full disclosure of all his rights. We say that he was called on to make a disclosure only as to those rights which he is alleged in the bill to be claiming, namely, the rights on the east fork. The paragraph of the bill calling for a disclosure is as follows (p. 1116, record 2036) :

"For as much as your orator can have no adequate relief except in a court of equity and to the end that the defendants may, if they can,

show why your orator should not have the relief hereby prayed, your orator asks that they may each be compelled to make answer to this, its bill of complaint, and to make a full disclosure and discovery in regard to the rights or pretended rights, if any they have, for diverting the waters from your orator's said land and obstructing its flow therein, *as is hereinabove charged*, and that they may each, according to the best and utmost of their knowledge, remembrance, information and belief, make full, true, direct and perfect answer to the matters *hereinabove stated and charged*, but not under oath, an answer under oath being hereby expressly waived."

The bill then prays for a general injunction restraining the defendants from diverting any of the waters from the river or either of the forks thereof. Our contention is that plaintiff must make his own case. He cannot call upon the defendant to make it for him, and that when the bill charged Hanley only with the dam and the ditches on the east fork of the river, and then asked for a full answer and disclosure as to the defendant's rights to divert the waters of the river from complainant's lands "*as is hereinabove charged*" and asked for a full answer to the matters "*hereinabove stated and charged*," it asked Hanley for an answer as to his rights on the east fork of the river only, and when he did answer fully as to those rights he performed his

duty fully and did all that was required of him. The affirmative part of Mr. Hanley's answer will be found on pages 4 to 13 of the record, and an examination of it will show that he answered most fully and in detail as to this dam and ditches on the east fork which are mentioned in the bill of complaint. So much for this so-called neglect of Hanley's to set up his leasehold rights on Section 31.

Aside from this controversy over the bill and answer which has just been discussed, the complainant's theory is that the decree allowed Hanley certain specific named rights, and except for those rights enjoined him and his successors forever from otherwise diverting the waters of the river. So that it makes no difference if he has acquired a new right from Altschul. Whatever right Altschul may have had he (Hanley) can't get it because he is prevented by the personal decree against him, and when Altschul's right passes to Hanley, Altschul's right becomes tainted with Hanley's limitations under the decree and Hanley cannot use it. This, it seems to us, is a false conception of what was accomplished by the decree. The bill of complaint was brought to determine certain water rights claimed by the various defendants for use on certain named lands and was really a bill to determine the water rights appurtenant to those lands. So that although the decree does perpetually enjoin the defendants and their successors in interest from diverting any of the waters of Silvies River, except

as in the decree allowed, it means that for the irrigation of those lands named in the decree they can use water only as allowed by the decree, but it surely does not mean that each one of those defendants is forever barred for the rest of his natural life from going out and acquiring, by purchase or otherwise, other water rights on Silvies River which were not involved in the decree.

It is true this decree personally enjoins the defendants, and a literal interpretation of its language might sustain complainant's contention, but let us look at the reason for decrees in equity being in this form and how far the form can govern in this case. Historically the equity courts have enforced their decrees in such a way that it is now generally stated that equity acts in personam, i. e., it imposes upon the party before it the duty to do or refrain from doing a particular thing. But this peculiar characteristic of equity is due rather to the form in which equitable remedies are administered than to anything in the primary substantive equitable rights. Acting in personam is peculiar to the remedial side of the equity court and not to the rights which equity courts recognize, create and enforce. When a court of equity summons before it numerous persons having rights in a certain stream and proceeds to adjudicate the relative rights of these parties, it first of all must adjudicate the validity and priority of the several claims and then proceed to enforce its decree in the characteristic equitable way, viz.: by injunction acting in

personam. But the injunctive part of the decree is only incidental to the establishment of the final water rights adjudged by the court. The injunction is but a way of enforcing the principal decree. This is the only theory upon which successors in interest could be bound by an equity decree to which they were never parties. The decree is *res adjudicata* as to them, not because they were parties to the suit, but because the decree does settle certain property rights.

If, then, a decree does settle property rights and grants injunctions to enforce its adjudication, then the force of the injunction should be no broader than the adjudication of rights contained in the decree. In other words, if the water rights of Section 31 were never adjudicated, then the injunctive portion of the decree ought not to be held to adjudicate them now by making the terms of the injunction effective against Mr. Hanley, as the present owner of Section 31. (See Pomeroy Equity Jurisprudence, 3rd Ed., Secs. 134, 135 and 170.)

In closing this part of the discussion of the 31 Dam we refer to the case of Josslyn vs. Daly, 15 Ida. 137, 96 Pac. 568. This case is right in point, especially in regard to the contention that Mr. Hanley cannot set up the Altschul right because he was lessee of that right when the suit was brought and should have set it up then. The case was as follows: In a previous case (Daly vs. Josslyn, 7 Ida. 657, 65 Pac. 442) Daly and Josslyn had litigated their rights to the waters of Seaman's

Creek. In that early case Josslyn had rested his claims for water entirely on his ownership of the "Kimbrough Ranch"; and although at that very time he had the "Galbraith Ranch" leased, he did not set up the water rights which he had as such lessee. Some time after that he bought the "Galbraith Ranch," thus changing his position, just as Hanley did, from lessee to absolute owner.

In the subsequent case of *Josslyn vs. Daly*, 15 Ida. 137, 96 Pac. 568, the parties were again litigating their water rights, and Josslyn set up the rights appurtenant to the "Galbraith Ranch" which he had purchased. It was contended that he could not do this; that he was bound by the judgment in the former case, and that having had the Galbraith place under lease at the time of the first case, and having failed to set up those rights in that case, when he had the opportunity to do so, he could not do it now. The court ruled against this contention, saying:

"It may be that Josslyn, having been a party to the case of *Daly vs. Josslyn*, would be bound as the tenant in possession of the Galbraith Ranch by the judgment entered in that case, and it is possible that during his tenancy he would not have been permitted as tenant to have raised this question, or have further litigated any rights he might have had either individually or as tenant of the Galbraith Ranch; but the title and possession that Josslyn now

holds is not as tenant, but as owner of the fee. He has acquired his title from a total stranger to the action of *Daly vs. Josslyn* and certainly cannot be precluded by that judgment from litigating any water rights that might have been appurtenant to the lands he subsequently purchased." (96 Pac., p. 571, first column.)

Even if Hanley was personally bound as an individual in regard to the 31 dam, the William Hanley Company would not be.

We are perfectly well aware that an individual will not be allowed to avoid the effect of a decree against him personally, by incorporating his property into a corporation and doing, as a corporation, what he could not do as an individual. We do not dispute that for a minute. We do wish, however, to point out to the court that the William Hanley Company is not William Hanley alone. It does include all of the lands which he held as an individual at the time of the decree, but it does include also the substantial interest of other people. For example, Mr. C. E. S. Wood conveyed to the William Hanley Company this very Section 31 now in dispute, and several other large and valuable tracts, in return for an interest in the corporation. If Mr. Wood, after obtaining the contract of sale of this section from Mr. Altschul, had taken the deed in his own name and become its owner instead of having it deeded to the William Hanley Company in return for stock in the William Hanley

Company, there can be no question that Mr. Wood would have had the right to water this riparian section from Silvies River independent of any decree. Is he then to lose this right because he has changed the form of this ownership from an outright ownership of the land to an ownership in a corporation which holds the land? In other words, is the William Hanley Company unable to buy a piece of land with its accompanying water rights merely because William Hanley, as an individual, had a lease on that land at the time of the original decree?

Often in this brief we have spoken of "Hanley" succeeding to the Altschul rights or of "Hanley's" ownership of 31. We have done so merely as a convenient way of speaking, but we do not wish the distinction between William Hanley and the William Hanley Company, a corporation, to be lost sight of for a moment. It is the William Hanley Company which, through Mr. Wood's contract of sale with Mr. Altschul, succeeded to the Altschul lands (record, p. 187). For convenience, too, we have sometimes spoken of the title to these road lands as being in Charles Altschul when strictly it was sometimes in the Willamette Valley & Cascade Mountain Wagon Road Company. They were really one and the same and it is shorter just to refer to the Altschul title.

The court's ruling in regard to the 31 dam is an attempt to adjudicate important property rights in a summary contempt proceeding.

It is well settled that contempt proceedings cannot be used to litigate important property rights. This rule was violated in this present case, and no better example can be found than this present case of the wrong that is done by attempting to adjudicate property rights in this way. Mr. Hanley was served with the complaining affidavit and order to show cause on the 29th of April, 1915 (record, p. 28). He was cited to appear on May 7th. He was in Portland when served and immediately had to go out to Harney Valley both to attend to some important matters regarding his cattle and to gather his witnesses and prepare for the hearing on May 7th. Not knowing whether he would be able to get back from Harney by May 7th his counsel, Mr. C. E. S. Wood, hurriedly prepared the affidavit which will be found on pages 29 to 46 of the record, and Mr. Hanley signed it and rushed off to Harney so as to try and get back in time for the hearing on May 7th. There was no time for either him or his counsel to look into these matters and prepare their case with the care which these important water rights demanded. The William Hanley Company's principal and oldest right on the west fork of the river was rushed into court and summarily tried eight days after the matter was first brought to the company's attention. The whole thing was done summarily in a hurry and the result

was that there were mistakes in Mr. Hanley's affidavit and in the testimony. There was no time to look up witnesses and records of past years. The old 31 Dam was put in in the eighties by Pete Stenger and a proper presentation of the case would have required finding witnesses who could go back to that time and trace the use of the dam up to the time Mr. Hanley got it and corroborate Mr. Hanley's testimony as to about the date when he succeeded Stenger in the lease and rebuilt the dam, and as to how Caspar Luig got an interest in it, and what water was diverted from it and where it went; a proper presentation would also have required a showing of the stock books of the William Hanley Company to show that that company is not simply William Hanley, incorporated, but includes other important interests. All of these things and many others were exceedingly important, and yet this case was tried without any adequate opportunity to go into them and substantiate them at all, with the result that the trial court has actually found that Mr. Hanley never had any interest in this dam at all.

Authorities on the rule that contempt proceedings are not appropriate to try property rights are:

In re Paschall, 10 Wall. 483, 492.

Ex parte Hollis, 59 Cal. 405, 413.

Baldwin v. Hosmer, 101 Mich. 119; 59 N. W. 432, 437, 2nd column.

SECTION 5

In the foregoing discussion of the 31 Dam we have referred principally to it as watering Section 31 because that was sufficient for the purposes of the argument, but we wish to point out that Section 5, cornering with Section 31 on the southeast, is in the same category as 31; that is to say, that Section 5 is also dependent on the 31 dam for irrigation (record, pp. 226, 227) and, like 31, was owned by Charles Altschul at the time of the decree and was subsequently purchased from Charles Altschul by the William Hanley Company through the medium of Mr. C. E. S. Wood (record, p. 237), as has been previously explained. The only difference between the two sections is that 31 lies right on the river and Section 5 does not, and Section 31 was under lease to William Hanley at the time of the decree and Section 5 was not.

THE YOUNG DAM

This dam is known as the Young Dam, but in reality Young has no interest in it and it is really the sole property of the William Hanley Company.

Our contention in regard to this is very much the same as in regard to the 31 Dam and will be repeated here only to the extent the difference in the facts warrants. The facts in regard to this dam are as follows: The defendant Young was, by the decree, allowed a dam in the west fork of the river for the irrigation of his land in the northeast quarter of section 30, township 23 south, range 31 east.

This old dam was nearly a quarter of a mile south of the north line of the section. This dam having washed out, Young and Hanley together built a new dam about a quarter of a mile further up the river just north of the section line between 19 and 30, Section 19 adjoining Section 30 on the north, and the dam being just barely in Section 19. The idea appears to have been that Young would use this dam in place of his old one, and the William Hanley Company would use it for the irrigation of Section 29, and also for the irrigation of Section 19, which was owned by the Harney Valley Improvement Company, a corporation in which Mr. Hanley, Mr. C. E. S. Wood and Mr. D. C. O'Reilly, of Portland, are the principal stockholders. The Pacific Live Stock Company brought a contempt proceeding against Young on account of his use of this dam and Judge Bean held him in contempt. (See Judge Bean's opinion, record, pp. 330-338.) After this Young ceased using any water from this dam whatever and turned all interest in it over to the William Hanley Company, which has used it for the irrigation of Sections 29 and 19, both of which were Altschul sections and not involved in the original decree (except that Section 19 was under lease to H. C. Levens at the time of the original decree, and he was given a right to water it as long as his lease continued).

The gist of the charge against Hanley regarding this dam is found in paragraph II of the complaining affidavit (record, pp. 18-19), and is that

Young, Hotchkiss and Thornburg built this dam and in April, 1915, diverted water from the river by its means, and that Hanley advised, encouraged and assisted them in these acts.

This charge against Hanley was not proved; in fact, the direct contrary was proved; but Mr. Hanley, again, in order to be quite frank with the court, stated openly that the William Hanley Company claimed the ownership of the dam for the irrigation of Section 29 and the Harney Valley Improvement Company's Section 19. It appeared very plainly at the trial, however, that although the William Hanley Company claimed the right to use this dam, it had not as a matter of fact used it this year at all. (Record, pp. 35, 188, 192, 236-237.) This is, to a certain extent, corroborated by Mr. Treadwell (record, p. 154), who says that when he visited the dam on the 25th of April no water was going out on the east side, which is the side it would have had to go out on to reach Section 29.

On this state of the record Judge Wolverton said that Hanley "violates the decree when he attempts to use any (water) by virtue of the Young Dam, whether old or new" (record, p. 59), and the trial court in his decree (record, p. 79) enjoined Hanley from using it.

We contend that this was erroneous for the following reasons:

1. It was going beyond the issues made by the complaining affidavit. That charged Hanley with

one thing only in regard to this dam, namely, that he assisted, advised and encouraged Young, Hotchkiss and Thornburg in their use of it in violation of the decree. This was the only charge made against Hanley and consequently the only thing for which the court could hold him in contempt. The proof failed utterly on this and there the court should have dropped it. Instead the court went entirely outside the issues made by the complaining affidavit and decided that Hanley had no right to use this dam, and forever enjoined him from using it.

2. This was adjudicating important property rights in a contempt proceeding, the error of which we have previously discussed.

3. The dam (though not used at all by Hanley that year) was for the purpose of irrigating Section 29, belonging to the William Hanley Company, and Section 19, belonging to the Harney Valley Improvement Company, neither of which sections were ever involved in the original suit. Both were Altschul sections and both were acquired after the decree.

We should say in passing that Mr. Hanley had no interest, leasehold or otherwise, in these sections at the time of the original decree and consequently the argument made against him in regard to Section 31, viz., that he should have set up his claim when he made his answer in the original suit, does not apply here.

The trial court's opinion seems to assume that Hanley is here claiming a right under or through Young. The opinion says (record, p. 58) :

“Hanley could acquire no better or superior right or interest in that dam by purchase from Young than Young had primarily. And as to the claim of Hanley that he helped to construct the dam, he could acquire no right to the use of the waters thereby for the reason that the dam was treated of by the decree. Young, Hotchkiss and Voegtly were permitted to maintain one dam at or near the locality where the old dam was located at the time of the entry of the decree, which dam, when open, should not unnecessarily obstruct the flow of the water in the stream. And the fact that Hanley assisted in the construction of the new dam could give him no greater rights than the original parties had to the use of the old dam. Furthermore, Hanley was a party to the original suit and he is bound, as in the case of the Luig dam, by the terms of the decree respecting the particular dam. Judge Bean, in the Young contempt proceeding, has held that Hanley should get none of any surplus water there might remain over Young's use; and he certainly has none that the decree gives him; so he violates the decree when he attempts to use any by virtue of the Young Dam, whether old or new.”

Now this is a complete misapprehension of Hanley's position. He does not claim the right to use any of Young's surplus water, nor does he claim anything by or under or through Young because of his purchase of this Young Dam. His claim is not based on Young's rights at all. It is simply this: That the William Hanley Company, as the successor to the Altschul rights, has a right to build a dam in the river for the irrigation of Sections 29 and 19 regardless of the decree. And the fact that the company, for mutual convenience, joined with Young in the construction of this dam makes no difference whatever in the company's rights. Young's dam permitted by the decree had washed out and he wanted to put in a new one. The William Hanley Company wanted to put in a dam at about the same time, so they joined together. That is all there is to it. It is precisely the same as if the William Hanley Company had built this dam entirely independently of Young. In fact that *is* the position now, for the company owns the dam independently of Young and the trial court has declared that *this dam* is not the Young Dam permitted by the decree at all, and that if Young wants to maintain a dam he must go down the river one-quarter of a mile to the old place and rebuild his dam there. (Record, pp. 72, 78.) This dam, therefore, of the William Hanley Company's on the south line of Section 19 is not the dam treated of by the decree at all. It is a new structure, built and owned by the William Hanley Company, for the irriga-

tion of land and the use of water rights not adjudicated in the decree. These water rights may be found, after a judicial investigation, to be worthless. They may be so late in time as to be not worth a dollar, but at any rate the William Hanley Company is entitled to have them judicially investigated, and the Pacific Live Stock Company, if it wishes to contest them, should bring a separate, independent suit where these rights can be tried out in the way which their importance demands, and not be summarily disposed of, on eight days' notice, in a contempt proceeding.

There was a good deal of testimony at the trial describing the structure of the Young Dam, and how much the water in the river was raised by means of the permanent board which is nailed across its bottom, and also whether the water was raised more by this dam than by the old Young Dam a quarter of a mile down the river. In preparing the record on appeal, eliminating immaterial parts as Equity Rule 75 requires, we have left all of this out, for we do not regard it as of any importance. In the view we take of the case, namely, that the William Hanley Company is claiming a new and independent right not in any way dependent on the old Young Dam, it would make no difference whether this William Hanley Company dam raised the water in the river six inches or six feet, or blocked up the river altogether. It might not have a right to do this, but the Pacific Live Stock Company, in order to show that it had no such right,

would have to bring an independent bill just as it would against any stranger to the decree. For these reasons we have omitted the testimony referred to.

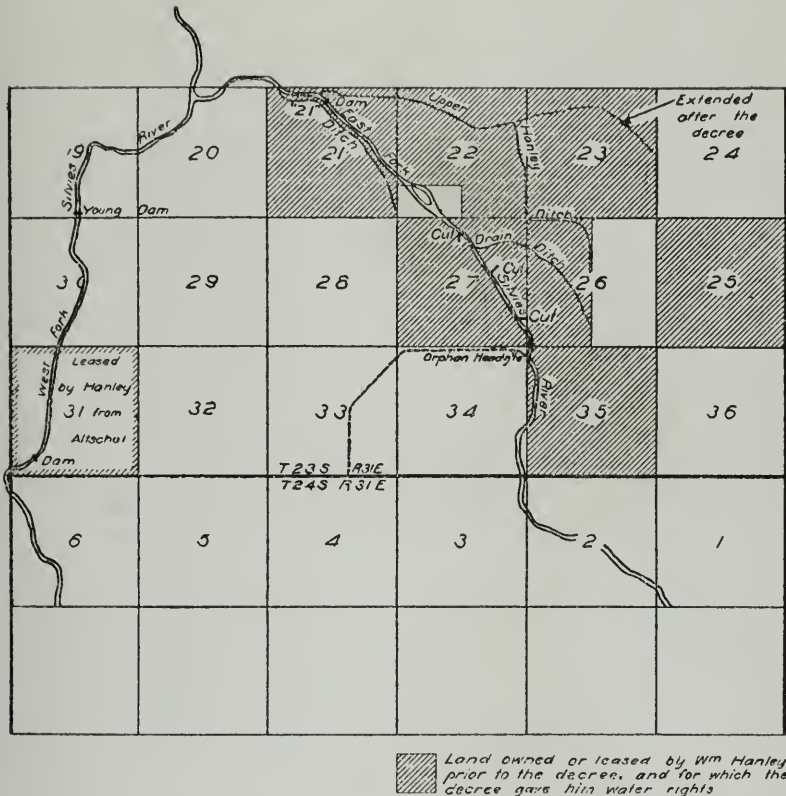
THE EAST FORK OF THE RIVER

The charges made in paragraphs III and IV of the complaining affidavit against Hanley were not sustained by the trial court. Indeed there was no evidence at all to sustain them and there was a great deal of evidence to the contrary. We therefore pass these by and come to the remaining charges, which all relate to the east fork of the river. The first of these charges relates to the drain ditch, the second to the 21 Dam and the next to the alleged diversions of water by means of so-called "cuts" in the river bank. We believe it will be conducive to a clearer understanding if we reverse this order and discuss the cuts first; then the drain ditch and next the 21 Dam. Before entering on this discussion, however, we wish to state that all of these alleged violations of the decree on the east fork were trivial, even if true. We think that this court will agree with that statement after it has read the evidence. And indeed this fact is practically admitted by Mr. Treadwell to be true, for he says that he had intended to overlook these matters on the east fork, and it was not until his ire was aroused by Mr. Hanley's use of the 31 Dam on the west fork, and his supposed other activities

there, that Mr. Treadwell decided to bring this contempt proceeding. His exact statement is:

“In fact, I said to Judge Webster, in addition to what I have said—I told him that I felt a little reluctance about this matter of taking any proceeding on that matter at that time, on account of the fact that I was Mr. Hanley’s guest when I was down there (on the east fork); and it was not until these other matters came up on the other fork, that could not be overlooked, that this proceeding was brought.” (Record, pp. 152-153.)

Coming now more specifically to the questions of the “cuts” and drain ditch, it is absolutely vital to a correct understanding of the issues involved, to have a clear picture before the court’s mind of the topography of the country at that point, and we therefore state it in some detail. The following sketch will give a fair idea of the course of the river through the sections and of the location of the drain ditch and of the Orphan Headgate and levee, and the position of the various “cuts,” as said position is stated in the complaining affidavit and Mr. Griffin’s testimony.



It is important to remember that the river, through Section 27, as we pointed out in our opening statement, has banks higher than the surrounding country and that it narrows very markedly as it proceeds southeasterly through Section 27, and in Sections 34 and 35, immediately south and south-easterly of Section 27, the channel becomes so small and meandering and choked that it is practically no channel at all. Consequently the river here is something like a funnel with its small end in Sections 34 and 35, and as the water pours down into this funnel it is of necessity forced out over the banks in Sections 27, 34 and 35, and in the old days,

before anything was done to relieve it, made these sections a marsh. The river channel re-formed again further south and carried this water through the Pacific Live Stock Company's Island Ranch and into the Malheur Lake. It was to relieve this marshy condition of Sections 27 and 35 and convert them from tule beds into hay meadows that the Hanley Drain Ditch was built. This ditch, as will be noticed from the plat, has its headgate in the river in the northeast quarter of Section 27 and flows in a general southeasterly direction through Mr. Hanley's land for about one mile, where it then enters the Pacific Live Stock Company's land in Section 26. This ditch was built about 1893 by agreement between Mr. Hanley and the Pacific Live Stock Company, and its theory was that it would relieve the excessive flooding of Sections 27 and 35 by diverting a part of the river away from those sections and carry it southeasterly to the Embree Slough, through which slough the water would be returned to the re-formed channel of the river further south. Of course it was not the object of the ditch to divert all the water away from these sections, but only to regulate the flow of the river past the headgate of the drain ditch so that the water which passed on would overflow these sections enough to give them natural irrigation and make them produce hay, but would not flood them into a marshy condition and make them produce tules. In a sense, therefore, the ditch is a very important part of the irrigation system of Section 35. One

might say it irrigates Section 35, not by putting water on it, but by taking some of the water off it; and the same is true of Section 27, and we suppose used to be true as to Section 34, although the Pacific Live Stock Company has taken other means to prevent the flooding of 34. And in fact the Pacific Live Stock Company, although it agreed to the building of the Hanley Drain Ditch, never had any interest in it nor does it claim any, except in that part of the ditch which lies on its own land in Section 26. It does not claim any right, nor has it any, to regulate the flow of water through the headgate of the ditch. Hanley has the sole right to operate and use the ditch, subject only to the limitation of the decree that he shall use it only for the purpose of draining water from the surface of his land and shall not use it as an irrigation ditch.

Some time after the entry of the original decree Pete Clemens and P. G. Smith put a small headgate in the river in the northeast corner of Section 34 and thereby diverted water for stock purposes through a small ditch known as the Orphan Ditch. This ditch carried a little water over to the northwest quarter of Section 34 and Section 33. We believe there was some litigation between the Pacific Live Stock Company and these men over this, but at any rate whether it was to settle litigation or for some other reason, the Pacific Live Stock Company bought out these men and has continued to use this Orphan Headgate and ditch. The headgate became out of repair and washed out so that the

Orphan Ditch diverted much more water than it formerly did, and in a previous contempt case, Judge Bellinger ordered the Pacific Live Stock Company to repair this headgate and maintain it so as to conform to the requirements of the decree. (Record, p. 330.) Notwithstanding this, the Pacific Live Stock Company in the Fall of 1914 put in a new headgate at this point much larger than the old one, and enlarged the Orphan Ditch throughout, placing all the dirt from the excavation on the south side of the ditch, so that this south bank of the ditch forms in effect a great levee, which holds the flood waters back on Section 27 and prevents their flooding Section 34. According to Mr. Gilcrest, superintendent of the Pacific Live Stock Company, the ditch and levee perform the double purpose of preventing the flood water from running off 27 onto 34, and of carrying this flood water and the water diverted through the Orphan Headgate, westerly onto Section 33 for irrigation purposes. (Record, p. 171.)

The general slope of the country is here southeast, so that the ditch, running due west, is against the grade of the country, and it is Mr. Hanley's contention that in order for the Pacific Live Stock Company to force the water through the ditch, it has, by means of its big levee, to back the water up over his Section 27 and cover the southern part of it with water, in some places two or three feet deep, which ruins it. Furthermore, that the natural flood which has perennially, and without any artificial assistance,

overflowed Section 27 and passed on should not now be held back and kept standing on Section 27. The Pacific Live Stock Company denies Mr. Hanley's contention that the Orphan Ditch backs the water up on him, and brings photographs and testimony to show that when the Orphan Headgate is opened to its full capacity the ditch will carry all the water without backing any up on 27, providing there is no water coming into the ditch off 27. But it appears that when water is coming off 27 and going into the ditch, filling it, then more water cannot be turned into the ditch from the headgate without causing the water to flow back onto 27. Or, looked at the other way, if water is flowing into the ditch from the headgate, filling it, the water from 27 cannot go into the ditch, and is held back, flooding 27. In other words, when the ditch is already full, with the water diverted from the Orphan Headgate, it is the same as if it was full of earth, or any other substance that obliterated it, and all there is left is the big levee along the left bank standing up above the plain. The situation is then the same as if there were no ditch at all, but simply a big levee, and whether it is the 27 water or the water from the headgate makes no difference. It is all intermingled and you can't tell. But in any event the levee backs the water back onto 27. Mr. Gilcrest testified that in enlarging the ditch and building the levee, in 1914, the intention was to make the ditch large enough to take care of the water from 27 (Gilcrest, p. 163). But, Mr. Griffin,

the engineer, admits there are times when the ditch won't do this (Griffin, p. 113), and the kodak picture which he took (complainant's exhibit, 23) certainly corroborates him.

With this prefatory statement of the conditions and the general topography on this fork of the river, we come now first to the question of the "cuts."

THE CUTS

The complaining affidavit charges (record, pp. 23 and 24) that by the terms of the decree the defendant William Hanley was enjoined from in any manner obstructing the channel of the Silvies River prior to the 5th of May each year, and was also enjoined from diverting any water therefrom, except as would naturally flow through the Upper Hanley Ditch, but that notwithstanding this the defendant Hanley during March and April, 1915, in willful contempt and violation of the decree, made the following diversions by means of cuts in the bank of the river on his land described in the decree, to wit:

"In the left bank of the east fork of Silvies River about nine hundred feet below the Hanley Drain Ditch, a cut in the bank of said river about twelve feet in width and three feet in depth, diverting about fifty second feet of water from said river; a cut in the left bank of said river about a thousand feet above the south line of Section 27, township 23 south, range 31 E., diverting about six second feet of water

of said river; besides the foregoing, the said defendant Hanley diverted a large quantity of water through numerous smaller cuts in said river through Section 27 and aided the diversion of water through the same, as well as the cuts aforementioned, in the following manner: The said channel of Silvies River through the said Section 27 and through Section 35 in the said township is small and sluggish and easily obstructed, and the said defendant Hanley, in willful violation and contempt of the terms of said decree, has, during the months of March and April, 1915, further obstructed the channel of said river by maintaining therein, on Section 27, the timbers of an old bridge, which has been destroyed, across the said river, and which timbers have been permitted to fall and lodge in the said river, and also by maintaining another bridge over the said river, the stringers of which are set into and below the banks of said river, and so that the same obstructs the flow of water of the said river, and the said defendant also permits to accumulate in the channel of said river and to be caught by said bridges and timbers, the carcasses of dead cattle and hogs and also other material which has obstructed the channel of the said river and prevented the water thereof from flowing down the same, and which assisted it to flow over the bank and out of the low places along the banks of said river, and also through

the cuts in the bank aforesaid; and by means thereof the said defendant has diverted about seventy-five second feet of water from said river on the west side in addition to the water aforesaid, and all of said acts of the said defendant have been in willful violation of the terms of the said decree."

The trial court absolved Mr. Hanley from any blame on account of the old timbers of the bridge and the stringers of the new bridge, and the dead cattle and hogs, etc., because the evidence showed either that Mr. Hanley had had nothing to do with them or that they were negligible anyway, but the court did find Mr. Hanley in contempt for not keeping the "cuts" in the river bank closed, and inserted a paragraph in his decree requiring Mr. Hanley to keep them closed.

It was the contention of the Pacific Live Stock Company that these "cuts" had actually been made in the bank artificially by Mr. Hanley. It was Mr. Hanley's answer that these "cuts" were natural openings in the bank which had been made by the action of the water breaking out over a low depression and then cutting deeper until a gap was formed, and that these gaps or openings had been there forever and were a natural part of the river, and that while he was under no obligation to keep them closed, still he nevertheless tried to do so, and especially so this year, in order to avoid any complaint by the Pacific Live Stock Company, and that the spade marks and

new earth at these "cuts," which the Pacific Live Stock Company evidently concluded had been done in opening them up, was really done in an attempt to close them.

The trial court apparently adopted Mr. Hanley's contention that these "cuts" were natural breaks or openings, but nevertheless held him liable for not keeping them closed, saying, in his opinion (record, p. 70) :

"He should have kept these breaks and gaps in the banks of the stream closed, or at least in very large measure. The just implications of the decree require this of him, as he is only given the flood waters to May 5th, and water pouring through rents in the banks cannot be termed flood waters."

(In passing we point out that of course the court could not have meant by this that Hanley's right to flood waters ceased on May 5th. He means that up until May 5th the only water Hanley has a right to are the flood waters.)

The court's view that these "cuts" were not artificial but are natural in the river bank is fully sustained by the evidence. Mr. Griffin, who was the complainant's chief witness on these "cuts," is himself uncertain whether they were artificial cuts or natural breaks, and his only reason for supposing that they were artificial is that he saw evidences of shovel work about them. (Record, p. 136.) And this shovel work was only at the largest ones. (Rec-

ord, p. 137.) And he admits that the whole river bank is "wavy" or indented with numerous natural depressions. (Record, p. 137.)

Mr. Treadwell, in driving down the river bank with Mr. Hanley, says he wasn't close enough to these "cuts" to notice any spade marks. (Record, pp. 150, 191.) And while Mr. Gilcrest is of the opinion that these depressions or openings in the bank are not as the bank was originally, it is worth pointing out that Mr. Gilcrest was not in the country in the early days (record, p. 175) and can hardly therefore be in a position to state how the river bank was originally. Even Mr. Gilcrest admits that the river bank is indented, and in flood times the water gets its relief from the safety valves or natural depressions in the bank, so that in flood times parts of the banks are under the water and parts are out of the water. (Record, p. 170.)

Mr. Newman, the foreman of the Pacific Live Stock Company's Island Ranch, says that the river has always been accustomed to overflow on Mr. Hanley's Section 27 (record, p. 183), and that the river bank is more or less indented (record, p. 184).

Mr. Hanley testified emphatically that no "cuts" had ever been made in the bank by him, his men or anybody else. (Record, pp. 201 and 208.) That these "cuts" were original with the country and were there when he first came to the country. That he cut hay on Section 27 in 1882 and 1883. (Record,

p. 208.) That the "cuts" are made by the water (record, p. 201), and there are more of them on the east bank than on the west bank because the country leans east. (Record, pp. 249-251.) That he doesn't want the cuts open because that lets the water run out through the low places, whereas his aim is to keep them closed so that the water will work out evenly over the top of the bank, and thus irrigate the land thoroughly and evenly. (Record, p. 204.) That he had a man working along the river here with special instructions to keep the "cuts" closed (record, p. 200), and he is especially sure about these instructions he gave because it was part of his general policy of conciliation toward the Pacific Live Stock Company this year to keep them closed. (Record, p. 202.) That the permanent method of filling the "cuts" is to haul dirt in with scrapers (record, p. 250), but if they wash out during the flood season, then they are temporarily repaired with stakes and boards and manure, which will hold at times when earth thrown in there would immediately wash out. (Record, pp. 249, 250.) That the photograph, Complainant's Exhibit 15, is not typical but only shows a cut closed by an emergency method. (Record, p. 250.)

George McLaren testified that he had been in Harney Valley twenty years and that the special work he did on the Hanley Ranch was the handling of the water. (Record, pp. 271, 272.) That Hanley has never cut gaps in the river (record, p. 277), and that his (McLaren's) job in regard to these river

banks has been to keep them in repair, and that every Fall he went around with his men and scrapers and fixed any places in the bank that were wearing out, or any breaks that had come in during freshets and had been fixed only temporarily; that he would make them as permanent as possible and would rebuild levees. (Record, p. 277.) Referring to some testimony of Mr. Griffin to the effect that he (McLaren) had stated to Griffin that these cuts formed a part of the Hanley irrigation system, Mr. McLaren explained that he had had reference to the cuts in the ditch bank on which he and Griffin were then standing — the Hanley Upper Ditch. (Record, p. 277.)

John Ryan testified that he had been in Harney Valley three years and was at present working for Mr. Hanley, and that during the Spring of 1915 his job has been looking after the water from north of 27 down to the Fennimore place and keeping the breaks in the river bank closed. (Record, p. 284.) That earlier in the season he had been working over on Section 5 and still had work there to do, but that about the third or fourth of April he was ordered by Mr. Hanley to leave the work over there and come over on the east fork of the river and close the breaks immediately (record, p. 295), and that these orders came direct from Mr. Hanley himself. (Record, p. 287.) That he fixed the "cuts" where the water was high, by putting poles across them and driving boards down into the ground with the

upper end of the board resting against the poles, and took a sled and team and hauled the old wet bottom of a hay stack and dumped it in against the boards (record, pp. 286, 287), and that this is a temporary method adopted during flood time, because it is the only way that you can make any dam or levee stick in a cut while the water is running through it. That to fill it with new earth is useless, for the water immediately cuts it out. (Record, pp. 286, 287 and 293.) That in the whole length of the river he has never seen any "cuts" that were made artificially, and wherever a "cut" has appeared it has been closed up some way or other (record, p. 288), and that the boards driven into the cuts are, as he has said before, to stop the water temporarily and are not meant to regulate the water by putting them in and taking them out (record, p. 293) and are not part of the irrigation system (record, p. 294), and that he hasn't had any of them out this summer, but on the contrary has been putting them in and putting stuff in with them to stop the water. (Record, pp. 294, 295.)

Will McLaren, a son of George McLaren, has been in Harney Valley eighteen years and has worked for Mr. Hanley a great part of the time and never got any orders to make cuts in the river banks and never did. (Record, p. 297.)

Dave McLaren, another son of George McLaren, has been in Harney Valley fifteen years and has worked for Mr. Hanley, some of his work being

in regard to irrigation, but not very much of it. He has never made any cuts in the river bank. (Record, p. 300.) He did help repair one "cut" about the middle of Section 27 on the east bank of the river. It looked as if it had washed out there, and was a place ten to fifteen feet wide, and they plowed a lot of sod and carried it on a sled to the cut, and made an embankment there about five feet wide. (Record, p. 301.)

This is all of the testimony in this present proceeding in regard to these "cuts," and it is certainly enough to show that they are made entirely by the action of the water, and the river bank has always had them in it; but if further corroboration is needed, it may be found in the testimony of Charles Cronin given in the original suit, the original transcript of which testimony is now in this court. Mr. Cronin was foreman of the Pacific Live Stock Company's Island Ranch, and testifying for the company, said (pp. 174 and 175 of the original transcript) :

"Q. Do you know anything about a cut in the bank of the river about the northeast corner of 34-23-31?

A. Yes, sir.

Q. What do you know about that?

A. I know there is a waterway there.

Q. What is the effect of it?

A. It draws the water out of the river.

Q. Do you know whether it is artificial or otherwise?

A. I cannot say, *I think it is natural.*"

This natural cut of Mr. Cronin's in the north-east corner of Section 34, joining 27 on the south, is on that very stretch of the river where the cuts which we have been discussing are located.

On top of all this testimony surely no argument is necessary to show that these "cuts" are natural washes by the water and not made by the hand of man. The only reason, apparently, that any contrary idea ever arose in the minds of the Pacific Live Stock Company was that young Griffin, traveling up and down the river here on the Hanley property, saw the poles and stakes and boards which Hanley's men had put in as a temporary makeshift to stop the water, and jumped to the conclusion that they were a part of the regular irrigation system of the Hanley Ranch, and were there to be put in and taken out at pleasure, and so control the water like so many water gates. We doubt whether even the Pacific Live Stock Company, after the explanation of these cuts that has been made in this case, believes that they are anything else but natural. We feel that it is sufficient to point out, by way of argument, only two things in regard to them. First: That Mr. Hanley does not want the water flowing out through these "cuts" for the reason that they naturally occur in the lower part of the bank and he wants the water to work out evenly over the whole bank and irrigate the higher ground as well. Second: That it is perfectly inevitable that the water should break out and make

these "cuts." It is more than probable—it is inevitable; you can't get away from it. The snow melts in the mountains and comes down in great floods and pours down through the river channel until it begins to hit Section 27, where the channel gets narrower and narrower and more like a funnel, until it practically ends entirely in Sections 34 and 35. There is thus no place for the water to go unless it breaks over the banks. The Hanley Drain Ditch, when open, will take care of part of it, but not all. There is no question about the channel through Section 27 narrowing up like the small end of the funnel as we have described. The testimony is uncontradicted that it does, and in fact the affidavit of the complainant itself, on which this very contempt proceeding is based, says (record, p. 24) :

"The said channel of Silvies River, through the said Section 27 and through Section 35, in the said township, *is small and sluggish and easily obstructed.*"

And it then goes on to say that the channel is so small and easily obstructed that even the carcasses of dead cattle and hogs tend to block it.

Even the trial court, while holding Hanley in contempt for what he calls Hanley's "inexcusable and purposeful neglect to suitably repair the breaks in the banks of the east fork of the river" (record, p. 72), was nevertheless of the opinion that the breaks were natural, as the language of his opinion

which we have already quoted shows. (Record, p. 70.)

If then they are natural and are a part of the normal condition of the river bank and have been so from time immemorial, can Hanley be held in contempt for not keeping them in repair, and can he be ordered, as the decree in this contempt proceeding attempts to do, to keep them in repair as one of the requisites of his purgation of the contempt? It is true that Mr. Hanley wants to keep these breaks closed. He wants to do it for his own purposes, as above explained; but it is one thing to want to do a thing for your own purposes and without coercion, and it is quite another thing to be told that you *must* do it as a condition of purging yourself from contempt of court, with the necessary implication that if you ever fail to do it you will be jerked up again for further contempt of court and either fined or imprisoned.

Now the decree says nothing about these cuts or breaks. Judge Wolverton, however, was of the opinion that the "just implications of the decree" required Mr. Hanley to keep them closed "at least in very large measure." (Record, p. 70.) In this, we think, there was error.

The words of the decree regarding Mr. Hanley's use of the water, after providing for the dates between which he may use his 21 Dam and the circumstances under which he may use his drain ditch, are as follows (p. 1170-1171, record No. 2036) :

“If at any time and while the dam of the said W. D. Hanley is open so that it does not obstruct the flow of the water in said river *and from natural causes the waters of the said east fork of Silrics River shall overflow its banks upon the land of the said W. D. Hanley,* or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described, *said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid and during such times as the same may run thereon from natural causes and without any obstruction of the channel of said river.*”

Doesn't this give Hanley the right to use water that comes through these natural breaks in the river bank? When water pours through one of these breaks isn't it overflowing the river bank and running on Hanley's land from “*natural causes*”? It must be conceded that the breaks are natural; that the hand of man had nothing to do with them. The trial court's opinion certainly concedes this. Instead, therefore, of the “just implications of the decree” requiring Hanley to close these breaks, does not the decree expressly give him the right to any water that may flow through them? We repeat again the words of the decree—whenever “*from natural causes the waters of said east fork of Silvies River shall overflow its banks upon the land of the*

said W. D. Hanley * * * *and during such time as the same may run thereon from natural causes* and without any obstruction of the channel of said river" he may use the water. If water running through a gap in the bank, which the water itself has made, is not running on Hanley's land from a natural cause, then it is difficult to conceive what a natural cause could be. To sustain this contention, it isn't even necessary to avail ourselves of the fact that these breaks in the river bank have been there from the earliest times. If there had *never* been a break in the river until this year, and then one occurred, and the water ran out through it on Hanley's land, it would be running thereon from a natural cause and he would be entitled to it.

The trial court says in his opinion (record, p. 70) that Hanley must keep these breaks closed because up until May 5th he is only given the "flood waters" and "water pouring through rents in the banks cannot be termed flood waters." If by this the court meant that Hanley could only have the water when it was overflowing the river bank throughout its whole length—the high places as well as the low—then we cannot agree with him. In the first place rivers do not generally overflow their banks in that way. They generally overflow in the low places, leaving the higher parts of the bank exposed, and that is all these "cuts" are—the low places in the bank where the water, years gone by, has sought an outlet through a depression and cut it out.

There is certainly nothing in the words of the decree to justify the trial court's holding. The words are whenever the water "shall overflow" the banks from "natural causes" and during such time as the waters "run" on Hanley's land from "natural causes" he may have it. The low parts of the bank, these gaps or breaks along the bank, are as much a part of the river bank as the highest point along it, and whenever the water flows out through them Hanley may have it. There is no magic in the words "overflow its banks," which means that the water must overflow the bank throughout—high parts as well as low. And that there was no intention to give the words any such restricted meaning is shown by the fact that a few lines later the decree abandons the word "overflow" and says that Hanley may have the water during such time as the same may "run" on his land from natural causes. We insist that by the very words of the decree Hanley has a right to this water which overflows the river banks through the gaps, as well as that which overflows the higher parts of the banks. Why, how is Hanley to govern himself under any other interpretation? How is he to know what are flood waters and what are not? How is he to know how deep a depression must be before it loses its character of a simple depression, giving him the right to take the water that flows through it, and becomes a "cut," to take water from which would render him liable to contempt of court. The man is harassed with difficulties enough, trying to get along with the

Pacific Live Stock Company under this decree, without requiring him to try to live under any such unworkable interpretation of it. Judge Wolverton, himself, seems to have recognized the difficulty with his own ruling, for after saying that Hanley should keep the gaps closed, adds, "or at least in very large measure." (Record, p. 70.)

So much for the strict wording of this part of the decree. But now looking at the thing in a broader light. Looking at the purposes of the bill of complaint and the objects which it sought to accomplish, and looking at the circumstances under which the decree was made, it will be perfectly apparent that Mr. Hanley has a perfect right to leave every one of these cuts open if he wants to.

The whole theory of the bill of complaint was that the complainant was a riparian proprietor and had a right to have the river flow *as it was wont to flow*. The complainant was a lower riparian proprietor fighting diversions of water made above it on the river. The best position for it to adopt was the position of a riparian owner who had the right to have the river flow down, as it was wont to flow, and it adopted this position and said to the defendants: "Now you have all got dams up the river above me diverting water out of the river, and I demand that you take them out and let the river flow down to me in its natural state, unhindered by you." The prayer of the bill makes this perfectly evident. All it asked was that the court compel the defendants to take out their dams, and

enjoin them from diverting any of the water of the river "or impeding the flow of any of said water down to and upon your orator's said lands as said water has heretofore been wont to flow therein when not interfered with by the defendants," etc. (p. 1116, record 2036). And the decree, based on the various stipulations of settlement, followed this same theory. The decree said to the various defendants: You may use your dams between such and such dates, and then said (p. 1180 of record 2036) "that except as thus permitted the defendants are perpetually enjoined and restrained and strictly inhibited from impeding the flow of any of said water to and upon the lands of the complainant hereinbefore described as the said water has heretofore been wont to flow thereon when not interfered with by the said defendants."

The *only* right then which the complainant has under this decree is to have the water of the river flow *as it was wont to flow*—and of course it does not even have this right during the periods the defendants are allowed to put in their dams.

Therefore when the river flowing down into the narrowed channel on Section 27 bursts its banks and pours out through the "cuts" which have been more or less all along the river bank in this part of its course from time immemorial, the river *is* flowing *as it was wont to flow*. It is doing just what it has always done. And the Pacific Live Stock Company cannot complain.

The complainant would have far more cause for

proceeding against Hanley as for a contempt on account of his closing up the breaks in the banks than to proceed against him for leaving them open. It might say with some propriety: "Here, this water has always poured through those rents on Section 27 and flowed down onto our Section 34, and the decree gives us the right to have the water flow upon our lands as it has been wont to flow unimpeded by you, and we don't want you to interfere with it by closing those cuts. We want to catch it up in our Orphan Ditch and use some on our 34 and carry the rest over onto our 33, and you let it alone." The complainant would have a better right to say this than what it is saying.

THE DRAIN DITCH

It is important to remember that the decree does not limit Mr. Hanley's use of his drain ditch to any specific dates. The only limitation placed upon him is that he shall use the drain ditch only for the purpose of draining water from the surface of his land and not for the purpose of irrigation. But *whenever* the surface of Mr. Hanley's lands needs draining, he may open the head of the drain ditch and use it for these drainage purposes regardless of dates. (Decree, p. 1170 of record No. 2036, and 200 Fed. 468, 484.) The theory of the drain ditch has been already explained. It is used to take some of the water out of the river and get rid of it when the river is too full and is flooding Sections 27 and 35 too deep, or is flooding them when Mr. Hanley wants the water kept off them.

We think it is sometimes a lack of appreciation of the fact that the sole limitation on Hanley's use of this ditch is that he shall use it only for drainage purposes, that leads the Pacific Live Stock Company to rush into these contempt proceedings. The Pacific Live Stock Company sometimes gets the idea that Hanley must not use this ditch if the Live Stock Company happens to want water, and leaves out of consideration altogether the fact that Hanley's lands may be needing drainage. For example, Mr. Treadwell, during the trial of this case, said to Mr. Hanley (record, p. 242) :

"Q. So you haven't yet got any idea that we object to your taking water through that drain ditch out of the river at a time when we need it for irrigation, and at a time when we need it for watering stock? You don't know we make that objection?"

This leaves out of consideration entirely the element of whether Mr. Hanley's lands needed drainage at the time, and is illustrative of the attitude too often assumed by the complainant that its needs must be satisfied regardless of other people's.

The charge against Hanley in the complaining affidavit in regard to this drain ditch was that during the months of March and April, at a time when it was unnecessary to drain water from the surface of his land, he had the head of the drain ditch open and so diverted more than thirty second

feet of water from the river and used it for the irrigation of his land. (Record, p. 22.)

The substance of the trial court's finding in regard to this was that Hanley had used the drain ditch in violation of the decree; that he had made the flood waters, which had poured through the cuts in the bank above described and inundated his land, an excuse for opening his drain ditch to get rid of these waters, and as he was responsible for not keeping these cuts in the river bank closed, he could not, when water had flooded his land through them, make that an excuse for opening the drain ditch to carry it off, and was therefore guilty of contempt. (Record, p. 70.) The trial judge also seemed to think that the alleged diversion of water at Mr. Hanley's 21 Dam had also contributed to the flooding of his land, and, like the water coming through the cuts, had been made an excuse for opening the drain ditch.

We have before shown that Mr. Hanley was under no obligation to keep the cuts closed and if we have convinced the court of the correctness of our view, it follows as a natural consequence that if water pours through these cuts and inundates Mr. Hanley's land he has the right to use his drain ditch to lower the water in the river and so prevent the inundation. We think your Honors will further be convinced that Mr. Hanley, although he was under no obligation to do so, did everything which a reasonable man could do to keep these cuts closed. But regardless of these considerations, we

expect to show that the trial court's conclusion that the drain ditch was opened to relieve the land of a flood which Mr. Hanley had himself caused is faulty because it has left out of account a very important fact in the testimony. And that fact is that the *drain ditch was admittedly closed tight during practically all of the time that flood was taking place*. The so-called diversion of water at the 21 Dam didn't commence until the first of April (Griffin, p. 94), and the water did not go through the breaks in the river bank until some time in April; the exact date is not disclosed in the testimony, but Griffin didn't take his photographs of the breaks nor make his measurements of the amount of water going through them until the 20th of April (Griffin, p. 102); and certainly no water went out through these breaks until the flood waters began to come, which was between the fifth and the tenth of April (Ryan, p. 296). That the flood waters didn't come earlier than this is corroborated by complainant's own witness Newman, who says that during March he couldn't even get enough water for his stock (Newman, p. 172), and that the high water came "some time along the first part of April" (Newman, p. 182). It is certain then that the so-called diversion of water at the 21 Dam didn't commence until April first and that the water didn't rise in the river so as to go out through the breaks in the bank until some time in April; and yet as early as the third or fourth of April, Hanley gave Ryan orders to close the drain ditch

headgate (Ryan, p. 295), and on April 5th Ryan did close it by putting in all the stop boards (Ryan, p. 288), and two days later, noticing that the gate was leaking underneath, tamped it tight with manure and stack-bottom (Ryan, p. 288). This corresponds with Griffin's testimony that it was closed tight sometime after the eighth (Griffin, pp. 93-94), and also with Newman's testimony that it was closed on the seventh or eighth (Newman, p. 177). The so-called diversion of water at the 21 Dam continued from the first of April until the third of May (Griffin, p. 94), and the water went through the breaks in the river bank apparently through most of April, since Griffin took his photographs of it on April 20th. The headgate of the drain ditch is admitted, even by complainant, to have been closed tight about April 8th. It is apparent therefore that practically all of the water through the breaks in the river, and most of the water said to have been diverted at the 21 Dam, came out of the river *after the drain ditch is admitted by everybody to have been closed*. How, therefore, the trial court was able to find that Mr. Hanley had purposely flooded his land and had then used this flood as an excuse to open his drain ditch, is more than we can understand. The main flood occurred after the drain ditch was closed.

Moreover, the water that left the river at the 21 Dam and ran into the Hanley Upper Ditch, was only forty second feet even according to complainant's contention (Griffin, p. 94), and was probably

carried by the main branch of that ditch into the northeastern part of the Hanley property, where it could have no possible effect upon this territory served by the drain ditch. Furthermore, when we come to consider the charge as to the 21 Dam we shall show that this water was not a "diversion" at all, but was only the water that ran naturally into the head of the Hanley Upper Ditch when the 21 Dam was open, and the right to have it thus flow is expressly given to Hanley by the decree.

We have pointed out what we conceive to be the error in the trial court's opinion; an error which we attribute to a failure to appreciate the *time* when the drain ditch was closed and the *time* when the lands were flooded. But we wish to go further and say that even if the drain ditch had been used to carry off the water from the breaks and the water flowing into the Hanley Upper Ditch at the 21 Dam, Mr. Hanley would have had a perfect right to so use it; providing only he did nothing to divert water at the 21 Dam before the date the decree permitted.

Before taking up Mr. Hanley's story of the use of this drain ditch we point out that the only witnesses for the complainant on the subject are Griffin, the young engineer who was working for complainant, and Ben Newman, complainant's foreman, and desire to call attention to some features of their testimony. First, we point out that Griffin first saw water running over the headgate of the drain

ditch several days before April 3rd, and on April 3rd and on April 8th he measured it and found thirty second feet of water going through it (Griffin, pp. 93 and 94); and it is largely for this that the complainant finds fault. Yet at this very time, according to Griffin's own admission, there was water standing on 27 and 35 and the river was overflowing its banks in 35 (Griffin, pp. 115 and 116), and he didn't follow down the drain ditch because "there was too much water there" (Griffin, p. 117). This certainly shows, if anything could, that the surface of Mr. Hanley's lands was covered with water at that time, and he had a perfect right to be using the drain ditch to carry it off. Another point in regard to Mr. Griffin's testimony is this: It is perfectly well known to all who are familiar with the Hanley drain ditch that it can't be used for irrigation. Being a drain ditch it runs through the low ground, not on high ground, as irrigation ditches must in order to put the water out on the land. Moreover, it only runs about a mile before it enters the Pacific Live Stock Company's land and water going down the drain ditch is lost to Hanley. Yet Griffin was so inclined to draw conclusions in favor of his own side, that he first said this water going down the drain ditch would benefit Mr. Hanley greatly because he could use it for irrigation, and then had to admit that he hadn't followed the ditch down, didn't know where the water went to, and really knew nothing about it; his testimony being as follows (Griffin, p. 117):

"Court: Would water going down the drain ditch benefit Mr. Hanley?

A. Why, I think so, greatly yes.

Court: In what way?

A. Getting the water spread out over those sections of the country it irrigated.

Court: Does the water spread out as it comes out the drain ditch, or does it pass off?

A. It will spread out over the land.

Q. Do you mean to say the water from this drain ditch, after it gets into the drain ditch, spreads out over Mr. Hanley's land?

A. It was apparently doing so at that time.

Q. Where was the water running out from the drain ditch below the headgate at the time you speak about?

A. I didn't follow it down. There was too much water there.

Q. Do you know, as a matter of fact, that there was a solitary inch of water going out of that drain ditch over Hanley's properties at that time?

A. No, I do not."

And this is the only testimony in the whole record to sustain the charge in the complaining affidavit (record, p. 22) that Mr. Hanley was using this water in the drain ditch for the irrigation of his land.

The other witness for the complainant on this subject of the drain ditch was its foreman, Ben

Newman. The gist of his testimony was that water was going out through the drain ditch all through March and up until the eighth of April (Newman, p. 172), and as a consequence he couldn't get enough water to water the stock which he was feeding down on Section 4, although twice in March he put boards across the headgate of the drain ditch in an attempt to force water down the river to the Orphan Headgate, where he could pick it up and carry it through the Orphan Ditch to Section 4 (Newman, pp. 172 and 173). His testimony is thoroughly unsatisfactory. It was a fact thoroughly proved by Hanley's witnesses and willingly admitted even by Mr. Griffin (Griffin, p. 114) that the headgate of the drain ditch was a well built, substantial, new structure, built only the previous Fall and made out of new lumber. Yet Newman says that it is not a good headgate; that it was good at one time, but it is now "pretty well rotted away" (Newman, p. 175).

There are two headgates at the drain ditch, one an old rotten abandoned one, which is nearest the river, and another new one placed as a substitute a little further down the ditch away from the river. The conclusion is irresistible from Newman's testimony, either that he never went to the drain ditch at all, and in giving his testimony was relying on his former knowledge of the old headgate, which he did not know had been replaced, or, if he did go up to the drain ditch, looked only at the old headgate, never saw the new one at all, and consequently from such superficial examination could not possibly

know whether any water was going down the drain ditch at all or how many boards there were in the new headgate to stop the flow of the water down the ditch. Furthermore, he is utterly unable to give any satisfactory explanation of how it was that when he put boards in the headgate, in order to force water down to his cattle in Section 4, he got no results. But as soon as Hanley's men closed the gate he got immediate results. (Newman, pp. 179-182.)

We come now to Mr. Hanley's justification of his use of the drain ditch. He says that the winter was "evenly cold" and the ice froze solid to the bottom of the river channel and blocked it, forming an ice dam, so that during March the choked, narrow channel down through Sections 27 and 35, blocked by this ice dam, was unable to carry what little water began to come down with the opening of Spring, and the water, even though there was not much of it, spread out over Sections 27 and 35, so that he really couldn't keep the water off these sections; that he was feeding cattle in Section 35 and it was necessary to keep the water off it on that account; and that as soon as Spring came and broke up the ice in the river and the channel was cleared, he issued strict orders to have the drain ditch closed, and told his men not to depend on the boards in the headgate, but to go out and haul stack-bottom and tamp it in there to be sure that it was stopped tight; and this was done. He says that in doing this he suffered the gravest injustice, because

the high water coming down the river was unable to go through the drain ditch, which he was keeping closed, and so poured out over Sections 27 and 35 and overflowed them; and that this condition on Section 27 was aggravated by the big levee of the Orphan Ditch, which the company had constructed and which backed the flood waters up on 27 to a depth of two feet and spoiled about two hundred acres of hay; and that it would have been a great benefit to him to have opened the drain ditch and let these flood waters off, but that he did not do it because he had set out on a deliberate policy of conciliation towards the Pacific Live Stock Company and he was willing to suffer almost any injury rather than give any possible ground for complaint.

The foregoing is in substance Mr. Hanley's testimony. (Hanley, pp. 194-199, 257-258.) It is not contradicted by any witness. For example, there is not a single witness who denies that the river channel was blocked with ice or that the water was standing deep on Section 27, backed up by the Orphan levee, after Mr. Hanley's drain ditch was closed tight. Indeed the latter fact is stated by Mr. Griffin himself and he even took a photograph of this water standing on Section 27 on April 20th,—twelve days after the drain ditch is admitted even by the complainant to have been closed. We ask your Honors to look at this photograph (Complainant's Ex. No. 23.) And Mr. Treadwell himself says that on the 18th of April—ten days after the

drain ditch was closed—he stood at the Orphan Headgate with Mr. Hanley and the lower end of Section 27 next to the Orphan levee was “a sea of water.” (Treadwell, p. 144.) Surely it is evident that to have opened the drain ditch would have been a great relief against this condition; and yet Mr. Hanley preferred to suffer the injury rather than arouse any friction with the Pacific Live Stock Company. The *Orphan Ditch* would not carry off this water. The photograph shows this. And, indeed, Mr. Griffin admits it (Griffin, p. 113) where he says: “Q. And you say that there were times when the ditch would not carry the water that came over 27? A. Yes.” Mr. Hanley’s conduct, therefore, as it seems to us, was the more admirable because this very flooding of Section 27, which he refrained from relieving by opening the drain ditch, was caused in large part by the Orphan levee, which the Pacific Live Stock Company had built.

We said that no one contradicted Mr. Hanley’s testimony that the winter was an unusual one and that the river channel became completely dammed with ice. Far from any contradiction, there was complete corroboration. George McLaren says that the ice was a “good deal thicker” this year than usual (McLaren, p. 280), and that as soon as the ice had gone out of the river he put enough boards in the stop gate to cause the water to rise to the top of the bank and overflow (McLaren, pp. 280 and 282). (Of course it is obvious that when he put in enough boards to cause the river to overflow the

banks there was no need to put in any more.) Ryan says that the river was "deeply froze," that he was feeding cattle there until about the 20th of March (the date when McLaren put the boards in) and there was still ice in the river then (Ryan, p. 296), and that he, on the fifth of April, put the boards in the headgate "full, clear up" (Ryan, p. 288). (This was apparently putting in the rest of the boards that McLaren had left out on the 20th because of the water overflowing the bank.) And Ryan says that he then worked two days repairing one of the breaks in the river bank, and then came back to the drain ditch (which would be about the 8th) and found an underdraft or leak through the headgate and plugged it with stack-bottom, and that he did these things pursuant to Mr. Hanley's instructions. (Ryan, p. 288.)

It is surely evident from all this testimony that Mr. Hanley was using the drain ditch most carefully, and was giving special instructions to his men to use it in a way that the Pacific Live Stock Company could not possibly find any fault with. He seems to have had this drain ditch particularly on his mind as a possible ground of complaint and was determined to avoid it. He certainly had the right to drain the water from his lands, when the ice was spreading the water over them in March and interfering with the feeding of his cattle on 35, and as soon as that condition ceased, he closed the drain ditch and kept it closed during a long period when it would have been of the greatest

benefit to him to have had it open to relieve himself of the flood.

This fact that he had the drain ditch closed during the flood period suggests another point which is worth noting, and that is that what the Pacific Live Stock Company is primarily interested in is to get the *flood waters* and, so far as the drain ditch is concerned, *it got them*. The whole compromise, which led to the entry of the original decree, was based on the theory that if the Pacific Live Stock Company could get the *flood waters* that came down in the Spring, it would let the various defendants put their dams in the river after certain specific dates in May. If the Pacific Live Stock Company could get the flood waters it was satisfied, and the defendants could take the balance. There is no question about this fact. It is illustrated in this very contempt proceeding where Mr. Treadwell, examining Mr. Gilcrest, asks (p. 156): "Q. And from your knowledge of conditions, is it possible for you to make a crop of hay on your property unless you get the water during this *flood period* in March and April?" And it is illustrated again on page 169, where Mr. Gilcrest says: "But it is a very important matter,—nothing more so—in the Spring to get that *flood water*, and I always make it a point to be there at those times, and look into it myself."

We have before shown from the testimony of Ryan and Newman that the flood did not commence

until between the *fifth and tenth of April*, and by that time the *drain ditch was sealed up tight*. It may have been with this idea in mind—namely, that the Pacific Live Stock Company's chief concern was to get the flood waters—that Mr. Hanley thought that leaving his drain ditch open in March to drain the water off his lands, could not possibly be a ground of complaint by the Pacific Live Stock Company; and it may have been with this same idea in mind that he gave his particular instructions on April third or fourth to seal the drain ditch tight, so that the Pacific Live Stock Company would get its flood waters, although to do so overflowed him as above explained. The truth is that this affair of the drain ditch, even if every syllable which the Pacific Live Stock Company says about it were true, was, like the other charges on the east fork, a trifling matter and would never have been heard of, if Mr. Treadwell had not got angry over the fancied “conspiracy” between Mr. Hanley and the men on the west fork.

An attempt was made by the complainant to show that Mr. Hanley was irrigating his Fennimore Place down in Section 3 in the adjoining township at the time his drain ditch was taking water—the inference being that if he was irrigating Section 3, it showed his land did not need drainage. As a commentary on this, it should be observed, first, that the Fennimore Place is a different body of land from that served by the drain ditch. The nearest corner of it would be more than a mile and

a half from the drain ditch. It doesn't appear whether it is high land or low. From the fact that it lies on the *west* side of the river and the country slopes *east*, we should judge it is higher ground. It is quite conceivable therefore that this land might need irrigation when the land nearer the drain ditch needed drainage. It should next be observed that Mr. Hanley does not say he was keeping the water off Section 35 because it did not need irrigation. He says he was keeping it off because he was feeding cattle there—quite a different thing. Finally it should be observed that nowhere in the testimony does it appear just *when* Mr. Griffin first saw the Fennimore Place being irrigated, but the photograph he took of it is dated April 14th—*six days after the drain ditch was closed tight*. (See Complainant's Ex. 26.)

Even if Mr. Hanley be considered to have violated the decree in the use of the Drain Ditch, the purgation of the contempt required by Judge Wolverton's decree is unwarranted and erroneous.

Judge Wolverton's decree (record, p. 78) says that Hanley may purge himself of the contempt by closing the drain ditch "*so as to prevent the same from diverting water from said river or from being used except to drain surface water from the lands described in said decree.*" The words in italics are what we object to. The requirement that Mr. Hanley must close the drain ditch "*so as to prevent the same from diverting water from said river*" is en-

tirely unwarranted by the original decree, and would forever destroy the usefulness of the Hanley Drain Ditch. The whole purpose of building the ditch was to do exactly what is now forbidden, namely, *divert* water from the river, in order that the river would not flood Sections 27 and 35 too deeply. The very fact that the head of the ditch is *in* the river shows this, and the right has always been recognized.

The other thing we object to is the use of the word "surface" in the requirement that Hanley shall not use the ditch except to drain "surface" water from his land. This is perhaps not so serious as the first objection, but is nevertheless objectionable. The original decree does not say "surface" water; it says simply "water," the exact phrasing being (p. 1170 of record No. 2036) that Hanley "shall maintain said ditch for the purpose of draining water from the surface of the land above described and not for the purpose of irrigation." Judge Wolverton, in his recent decree, has added a further restriction by interpolating the word "surface" before "water."

This may not seem very serious, but Mr. Hanley's experience with the Pacific Live Stock Company, since the original decree was entered in 1901, has made him fearful, and we do not like to see any new words interpolated in the decree. We do not know what possible new contention the Pacific Live Stock Company might base upon them.

Judge Wolverton, by the above language, has

required Hanley to close the drain ditch so that it will do neither of two things. One—divert water from the river, or, two—be used for anything except to drain *surface* water from the lands. All that Judge Wolverton had a right to do was to require Hanley to observe the terms of the original decree, to wit, use the drain ditch only for the purpose of draining water from the surface of the land.

In fairness to the trial court we must say that we think this is mere carelessness. We do not think he intended his present decree to go further than the original decree. But the present decree was prepared by complainant's attorneys, and Judge Wolverton probably signed it without noticing the defect in it.

THE 21 DAM

The 21 Dam is Hanley's big dam in the east fork up in Section 21 and is the source of the Hanley irrigation system. From it the Hanley Upper Ditch—quite a good sized canal—leads off easterly, as shown on the sketches in this brief, and the 21 Ditch, a smaller ditch, on the west side of the river, leads off down through Section 21, closely paralleling the river. As we have before pointed out, the Hanley Upper Ditch is sometimes carelessly referred to in the testimony as the 21 Ditch, from the fact that it leads off from the 21 Dam. But this is a mistake. The true 21 Ditch is the small ditch leaving the 21 Dam, and running down the *west* side of the river, while the larger ditch on the

east side of the river is properly the "Hanley Upper Ditch." This 21 Dam is quite a large structure,—in fact the whole width of the river—and the up-rights in it, against which the horizontal boards are placed when it is desired to close the dam and stop the water, divide the dam into four divisions or openings, through which the river runs when the boards are not in. The dam has a rock foundation and its bottom is slightly above the bed of the river. Complainant's Exhibit 11, a photograph of the dam, shows this quite clearly.

This is the dam against which the bill of complaint was directed. The decree allows Hanley to close this dam and thereby divert the water from the river into his two ditches leading from it, from the fifth of May to the first of July each year, and further allows him to take any water, regardless of dates, that may naturally flow into his said ditches while his dam is open so that it does not obstruct the flow of the river (p. 1170 of record No. 2036). It will be observed that Hanley thus has two rights at this dam,—one, at any time of the year, without any limitation of dates, he may take such water as flows into his ditches while his dam is open; and, two, he may close his dam and take sufficient water to irrigate his lands between May 5th and July 1st of each year.

The charge against him is that during March and April, 1915, he maintained one board part way across this dam, and permitted brush and debris to accumulate above the dam, so that it became

obstructed and raised the water about a foot above the floor of the dam, and by these means diverted into the Hanley Upper Ditch more than forty second feet of water. (Complaining affidavit, record, p. 23.) Mr. Hanley's answer is found in his affidavit, record, pp. 38 and 39. He denies that he placed or maintained a board part way across the dam or deliberately permitted brush to accumulate above the dam, but says that he is necessarily absent from this locality a great deal of the time and it is possible that for a short period one board may have been part way across the dam, and brush may have accumulated above it; but if so, this was without any design and without his knowledge and had no material effect on the flow of water; and that all such accidental obstructions, which to a slight and temporary extent occur every year, were removed by his orders as soon as perceived; and he denies that the water was raised one foot above the floor of the dam, or that forty second feet of water, or any substantial quantity, was diverted into the ditch.

Complainant's Exhibit 10 is a kodak picture, taken on April 8th, of this 21 Dam showing the brush in it.

The testimony in regard to this matter of the 21 Dam is fairly clear. Mr. Griffin says that this dam was diverting close to forty second feet of water from the river from the first of April to the third of May. (Griffin, p. 94.) That there was one board across one of the openings of the dam and

some willow brush was against the other openings, and that in consequence the water was raised in the river about a foot. That some of the brush was old and had evidently floated down the river; other pieces of it had the appearance of being cut, as with a hatchet or ax. (Griffin, p. 95.) That the dam remained in this condition with these obstructions in it from the first part of April until the twenty-fifth or twenty-sixth of that month. (Griffin, p. 96.) And on cross-examination he says that he was at the dam "around the 24th" of April and saw that the obstructions had been removed. (Griffin, p. 128.) He further says on cross-examination that the one board in the dam was a two-by-six (Griffin, p. 124) and was about four feet long, and that there are four openings in the dam, each about four feet in width. (Griffin, p. 125.) Asked whether the brush had the appearance of being deliberately laid in the dam, he said: "Well, they were not laid in there symmetrically no," and also admitted that he didn't see along the banks of the river anywhere in the vicinity of the dam any place where willows had been cut. (Griffin, p. 128.) He said further that the 21 Ditch leading out on the west side of the river from the dam had its headgate closed, and if that headgate had been open and the brush and board and all obstructions removed from the 21 Dam, the water would have run naturally from the river into that ditch (Griffin, p. 130); and that the board in the dam was in the slack water on the opposite side from where the current was (Griffin,

p. 138), and consequently where it would make the least obstruction.

Mr. Gilcrest says that he saw the dam with these obstructions in it on the 25th of April (Gilcrest, p. 161), which corresponds fairly closely with Mr. Griffin's testimony that the dam remained obstructed until the 25th or 26th of April. (Griffin, p. 96.)

The testimony of these two men is that on which the complainant relies.

Mr. Hanley testifies that he was at the 21 Dam "last Fall" (1914) and wasn't there again until Spring (Hanley, p. 205), when he and Judge Webster visited the dam together and Judge Webster said to him that the Pacific Live Stock Company was complaining about some brush and a board being in the dam, and Hanley went and looked and didn't see any board, but that there were some little willows floating on top of the water against the dam; that the permanent structure of the dam is probably two feet higher than the level of the river, and consequently as the water flows through the dam it "breaks away with the current" (i. e., the water was lower where it ran through the lower end of the dam than it was at the upper end of the dam where the willows were floating). That the willows were not diverting any water and could not be called an obstruction, but nevertheless he gave orders to have them taken out, and he thinks this was about the 20th of April. (Hanley, p. 206.)

Asked whether the board and brush diverted forty second feet of water, as charged in the complaining affidavit, he said no they did not divert any water, and that if he had been strict about getting all the water from the 21 Dam which the decree entitled him to, he would have opened the head of his 21 Ditch (on the west side of the river) and water would have been running into it all Spring; that he had not taken out as much water at the 21 Dam as would naturally run into his ditches there with the dam entirely open, because he hadn't been "technical to the use of the water in all those little details" to try to get all that his strict rights entitled him to. (Hanley, pp. 206-207.)

George McLaren testified that some time toward the last of April he took this brush out of the 21 Dam (McLaren, pp. 277-278) and he found a few willows and some small twigs, little small stuff that had lodged in the high water; that there were two or three willows there that were six or seven feet long; that they were not obstructing the water at all when he was there, but were out of the water (it will be remembered that the highest flood occurred during the earlier part of April and consequently the water had fallen somewhat at this time). That he got hold of one of these willows and pulled it loose and this freed the others and they all floated away (McLaren, p. 278); that when he pulled the willow loose he pulled a board up at the same time, and he does not know whether it

was one of the regular boards of the dam or not. (McLaren, p. 279.)

These are all the witnesses on this subject.

Now there is one thing that certainly is apparent from this testimony, and that is that whatever brush or board got across the 21 Dam got there without any intention of Mr. Hanley and without even his knowledge. You have got to believe him when he says he never heard about it until he and Judge Webster were at the dam on April 20th. And the trial court should not have held him in willful contempt. If there had been any willful intent on Mr. Hanley's part to obstruct the flow of the water through this dam, do your Honors suppose that he would have selected one little board six inches high and four feet long to place in a dam at least sixteen feet wide? And do your Honors suppose that he would have placed it in the slack water? And would the willows have been so carelessly lodged that even Griffin says it didn't look as if they had been symmetrically laid in there, and when McLaren pulled one of them loose they all floated away? Moreover, if there had been any intent on Hanley's part to get all the water he could at this dam, would he have allowed the head of his 21 Ditch to remain closed during the whole time, when even Griffin admits that if it had been opened water would have run into it, even if there hadn't been any board or willows in the dam at all? The complaining affidavit charges Hanley with "placing" the board in

the dam, but merely with "permitting" the brush to accumulate.

The Silvies River is lined thickly with willows throughout its whole course above this dam and there are ranches all along the upper river from which these willows at the dam could have floated down. It is even in evidence that the Pacific Live Stock Company itself was surveying and doing engineering work along the upper river, and the willows with the hatchet marks on them may have even drifted down from this very work. Anyway it is plain enough that these willows simply drifted down the stream, caught in the dam and Hanley had them taken out as soon as he knew about them. Certainly this is not a thing for which to hold a man guilty of willful contempt.

Next: Did these "obstructions," such as they were, divert any water at all from the river. Mr. Griffin says they did. Mr. Hanley says they did not. That Mr. Hanley is right is shown, as clear as day, by one of Mr. Griffin's own admissions; and that admission is *that the same amount of water continued to flow into the head of the Upper Hanley Ditch after the "obstructions" were removed, as flowed into it when they were in the dam.* Mr. Griffin says that the obstructions were removed about the 25th or 26th of April. (Griffin, p. 96.) In another part of his testimony he says they were removed "around the 24th." (Griffin, p. 128.) But give him the benefit of the discrepancy and say it was the 26th. This then was when the obstructions were removed.

But the Hanley Upper Ditch continued to take forty second feet of water up till the third of May, according to Griffin's own statement. (Griffin, p. 94.) So that the same amount of water ran into the ditch when the obstructions were taken out as when they were in, and it is consequently demonstrated to a mathematical certainty that they exercised no influence whatever on the flow of the river through the dam and did not divert any water at all.

The fact is pretty clear that Mr. Griffin was fooled, by the drop of the water flowing through the dam and the sight of the willows lodged above, into thinking that, because the water stood lower on the bottom of the dam at its down-stream end than at its up-stream end, the willows were raising the water. As Mr. Hanley has pointed out in his testimony, and as is apparent from a glance at the kodak picture of the dam which complainant introduced in evidence (Complainant's Exhibit No. 11), the bottom of the dam with its rock foundation is higher than the bed of the river. Consequently, as the water enters the dam on the up-stream side it is held up a little, and then as it flows past the up-rights in the middle of the dam, it breaks sharply into a swifter current, due to the free outlet afforded by the lower end of the dam, and consequently is lower in level where it rushes off the lower end of the dam, than it is where it is held up a little at the upper end of the dam. When Mr. Griffin saw the board and the brush lodged against the up-rights of the dam and saw that the water above the brush

was higher than it was below it, he concluded that it was the brush and board that were raising the water; but he was deceived by the action of the water which we have described as it runs through the dam, and the willows were simply floating on top of the water against the uprights and were not an obstruction. The one board (only six inches by four feet remember) was in the slack water and certainly had very little, if any, effect.

That we are right in this must be so since, as we have shown, the Hanley Upper Ditch was taking as much water after the obstructions were out as when they were in.

THE CHARGE IN REGARD TO THE PEOPLE'S DITCH

This charge related to the People's Ditch on the west fork of the river and is contained in paragraph VI of the complaining affidavit. (Record, p. 25.) It was not sustained by the evidence, and the trial court absolved Hanley from it. Consequently we have not assigned it as error and need not discuss it.

THE PROOF MUST BE BEYOND A REASONABLE DOUBT

In closing this brief we wish to call the court's attention to the fact that even cases of civil contempt, as distinguished from cases of criminal contempt, partake of the nature of a criminal proceeding. They are *quasi*-criminal, and it is within the power of the court to punish the defendant by fine and imprisonment. The proceedings being *quasi*-

criminal, the rule of criminal law obtains—that the proof must be beyond a reasonable doubt.

The following are cases of civil contempts, wherein the authorities have laid down this rule:

In *California Artificial Stone Paving Co. vs. Molitor*, 5 Sup. Ct. Rep. 618, Mr. Justice Bradley said, at the close of his opinion, page 622:

“Process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant’s conduct.”

In the case of *Accumulator Company vs. Consolidated Electric Storage Company*, 53 Fed. 793, the court said, at the close of his opinion, page 796:

“This proceeding is criminal in its nature and character and the same rule should govern as in the trial of indictments. The burden of proof establishing violation of the injunction is upon the complainant, and the defendants are entitled to the benefit of any reasonable doubt.”

In *Birdsell vs. Hagerstown Agricultural Implement Mfg. Co.*, Federal case No. 1436 (an infringement of patent case), the court said, 3 Fed. Cases, page 450, first column:

“Now, it is a rule governing courts of equity in such cases that they will never attach a defendant for contempt where the violation of

the injunction is not plain, and proved to the satisfaction of the court."

In *State ex rel vs. Small*, 49 Ore. 595, the court said, at the close of the opinion, page 603 :

"In contempt proceedings for an alleged violation of an order or of the process of a court, the proof of the guilt of the person charged with the offense, should be clear and conclusive before he is punished therefor."

The same rule is laid down in *General Electric Company vs. McLaren*, 140 Fed. 876, 878 (an infringement of patent case).

In 9 Cyc, page 45, it is said :

"A clear case of contempt of court must be established by the evidence. Proceedings in contempt being in their nature criminal in character, the strict rule of construction applicable to a criminal prosecution obtains therein, and presumptions and intendments will not be indulged to sustain a conviction. The guilt must be established by clear and satisfactory evidence; a mere preponderance is not enough. The accusations must be supported by evidence sufficient to convince the mind of the trior beyond a reasonable doubt of the actual guilt of the accused."

In this case certainly the proof has not come up to the requirements of this rule. Not one of the charges of the complaining affidavit have been

proved by even a preponderance of the evidence, to say nothing of evidence beyond a reasonable doubt.

And in our opinion the matters on the east fork are all so trivial, even if all that the complaining affidavit says about them were true, that they never would have been made the basis for a contempt proceeding had the troubles not arisen on the west fork. As to all of these troubles, east and west fork alike, Mr. Hanley cannot get it out of his mind that when the Pacific Live Stock Company wrote to H. I. Corbett April 5, 1915, and asked Mr. Corbett to treat Mr. Hanley as his hired man and direct him to cease his supposedly hostile attitude toward the Pacific Live Stock Company in regard to that company's land suits, and when Mr. Corbett refused to adopt any such tone toward Mr. Hanley (Defendant's Exhibits "A" and "B," Record, pp. 314-319), and when Mr. Treadwell asked Mr. Hanley for his help in these same land matters and Mr. Hanley refused (record, pp. 210-211)—it is Mr. Hanley's conviction that after these matters and in consequence thereof, this contempt proceeding was brought to punish him for his attitude.

Respectfully submitted,

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